146 U S 102

RECORD, CASE No. 13,425.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1891.

TERM No., ~~289.~~ 28

ASENATH A. WARE, DAVID P. LUMPKIN, MARY A. HOLTZCLAW, AND JAMES T. HOLTZCLAW, HER HUSBAND; THOMAS W. COWLES, DANIEL O. WHITE, AND CLEMENT B. WHITE, APPELLANTS,

vs.

THE GALVESTON CITY COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF TEXAS.

FILED NOVEMBER 5, 1888.

RECORD, CASE No. 13,425.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1891.

TERM No., 289.

ASENATH A. WARE, DAVID P. LUMPKIN, MARY A. HOLTZCLAW, AND JAMES T. HOLTZCLAW, HER HUSBAND; THOMAS W. COWLES, DANIEL O. WHITE, AND CLEMENT B. WHITE, APPELLANTS,

vs.

THE GALVESTON CITY COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF TEXAS.

INDEX.

	Original.	Print.
Caption	1	1
Stipulation as to transcript on appeal	2	1
Original bill	5	2
Answer	19	14
Schedule No. 1—Articles of agreement between Menard, Triplett, Neblett, Gray, Green, Jones, and Johnson, June 15, 1837	42	33
No. 2—Letter of Ashbel Smith to Wm. C. Ballinger, June 10, 1882	47	37
Evidence for complainants	48	38
Testimony of James P. Cole	50	38

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., MARCH 21, 1892.

	Original.	Print.
Exhibit A—Letter of G. Borden, Jr., to Dr. Clement Billingslea, June 23, 1843	59	47
B—Historical record of Galveston city stock originally issued to David White	61	48
C—Sixty-seven shares Galveston city stock issued by the trustees to David White and five shares issued by the same to Abner S. Lipscomb	68	56
D—Statement of cancelled stock and sale of lots	84	71
E—Letter of Levi Jones to General M. Hunt, August 22, 1839	93	80
F—Certificate of purchase No. 242, December 25, 1839	95	82
G—Letter of A. F. James to Robert J. Ware, April 22, 1858	96	83
H—Letter of A. F. James to Robert J. Ware, May 15, 1858	96	84
I—Letter of A. F. James to Robert J. Ware, June 5, 1858	97	84
Testimony of John L. Darragh	114	101
Stipulation as to deposition of Thos. J. Molton	117	103
Deposition of Thomas J. Molton (direct)	117	104
Exhibit 1—Power of attorney from Rob't J. Ware to Clement Billingslea, November 22, 1842, &c.	128	115
2—Letter of Rob't J. Ware to Billingslea, November 22, 1842	129	116
3—Letter of Billingslea to Ware, Dec. 21, 1842	130	117
4—Letter of Billingslea to Ware, Dec. 3, 1843	131	118
5—Letter of Billingslea to Ware, Jan. 12, 1843	132	119
6—Letter of Ware to Lipscomb, March 5, 1854	134	121
A[1]—Letter, Lipscomb to Ware, December 24, 1842	135	121
A[2]—Receipt, White to Lipscomb, Dec. 4, 1838	135	122
A[3]—Statement of an account of Galveston stock, &c.	135	122
A[4]—Statement of an account of Galveston stock, &c.	136	122
A[5]—Receipt to Green	136	123
A[6]—Order of Lipscomb on Turner	136	123
A[7]—Order of Lipscomb on Love	136	123
A[8]—Receipt to Lipscomb, January 9, 1844	136	123
A[9]—Receipt of Jones, June 6, 1839	137	123
A[10]—Receipt of Jones	137	124
A[11]—Receipt of Love, March 4, 1842	137	124
A[12]—Assignment of Lipscomb to Love	137	124
Deposition of Thomas J. Molton (cross)	138	124
Exhibit 1—Letter of Molton and Ware, executors, to Ballinger, Jack & Mott, January 23, 1878	158	145
Stipulation as to deposition of Robert Y. Ware	159	146
Deposition of Robert Y. Ware	160	146
Asenath A. Ware	165	151
Evidence for defendant	168	155
Deposition of John P. Borden	168	155
Ashbel Smith	172	159
Joseph Bates	178	165

	Original.	Print.
Exhibit A—Letter, Bates to Ware, July 9, 1858	182	168
B—Letter, Lipscomb to Bates, November 14, 1850	183	169
Stipulation as to deposition of Wm. H. Goddard	185	171
Deposition of Wm. H. Goddard	186	172
Exhibit A—Letter, Ballinger to Goddard, Aug. 10, 1882	209	194
B—Letter, Ballinger to Goddard, Sept. 23, 1882	211	196
Deposition of W. B. P. Gaines	212	197
J. A. Lipscomb	222	207
Stipulation as to deposition of W. P. Ballinger	226	211
Deposition of W. P. Ballinger	226	211
Stipulation as to certain evidence	244	228
Power of attorney from David White to A. S. Lipscomb, April 8, 1839	246	229
Papers relating to White's estate in Texas	247	230
Papers relating to White's estate in Alabama	251	234
Memoranda of proceedings in suit, Lipscomb, administrator, *vs.* Menard & Jones	254	237
Deposition of W. P. Ballinger	260	242
Letters attached to deposition of Ballinger	268	250
Stipulation submitting cause, &c.	292	272
Order submitting cause	293	273
Final decree	294	274
Order allowing appeal	295	274
Prayer for appeal	296	275
Waiver of citation	296	275
Appeal bond	297	275
Clerk's certificate	299	276

1 United States Circuit Court, Eastern District of Texas, at Galveston.

ASENATH A. WARE, DAVID P. LUMPKIN, MARY A. Holtzclaw, and James T. Holtzclaw, Her Husband; Thomas W. Cowles, Daniel O. White, and Clement B. White, Complainants,
vs.
THE GALVESTON CITY COMPANY, Defendant. } No. 155. Equity.

Be it remembered that at a regular term of said court, begun and held at the court-rooms of said court, in the city of Galveston, in said district, on Monday, the 1st day of November, 1886, and continued by adjournment down to and including the 30th day of November, 1886, to wit, on said last-named day, the Hon. Don A. Pardee, United States circuit judge, and Hon. Chauncey B. Sabin, United States district judge, judges presiding in and holding said court, a final decree was made and entered by said court in the cause above named, and the complainants in said cause having prayed an appeal from the judgment so entered in said court to the Supreme Court of the United States, and said appeal having been allowed by the court and appeal bond approved and filed, the record and proceedings in said cause are here set out as follows, to wit:

2 United States Circuit Court, Eastern District of Texas, at Galveston.

ASENATH A. WARE *et al.*, Complainants,
vs.
THE GALVESTON CITY COMPANY, Defendant. } No. 155. Equity.

It is hereby agreed between counsel for both the complainants and the defendant that the clerk in making up the transcript in the above entitled and numbered cause on appeal taken by complainants to the Supreme Court of the United States shall include the following only, viz:

1. Original bill, filed March 18, 1881.
2. Answer, filed July 3d, 1882.

Both printed together, the printed document being marked filed Oct. 13th, 1885.

3. Evidence in the cause as printed and containing 242 pages and 1 exhibit of printed matter, the printed document being marked filed Oct. 13, 1885.
4. Agreement submitting cause, filed April 20, 1886.
5. Order from minutes, cause submitted " " "
6. Decree dismissing bill, from minutes Nov. 30, 1886.
7. Order allowing appeal " " " " "
8. Appeal by complainants and acceptance of service by counsel for defendant, filed July 18, 1888.
9. Appeal bond.

And a transcript of said papers and proceedings shall constitute the record of said cause on appeal to the Supreme Court.

G. E. MANN, *Solicitor for Complainants.*
WILLIE, MOTT & BALLINGER,
Att'ys for Defendant.

3 Indorsements: "No. 155. Equity. Asenath A. Ware *et al. vs.* The Galveston City Company. Agreement as to transcript on appeal. Filed July 20th, 1888. C. Dart, clerk."

4 In the Circuit Court of the United States for the Eastern District of Texas, at Galveston.

ASENATH A. WARE, DAVID P. LUMPKIN, *et al.*, Heirs-at-Law of David White, Deceased, *vs.* THE GALVESTON CITY COMPANY. } Chancery. No. 155.

Original bill filed March 18th, 1881.

Answer filed July 3d, 1882.

"Filed Oct. 13th, 1885.

C. DART, *Clerk.*"

5 In the Circuit Court of the United States for the Eastern District of Texas, in 5th Circuit.

ASENATH A. WARE, DAVID P. LUMPKIN, *et al.*, Heirs-at-Law of David White, Deceased, *vs.* THE GALVESTON CITY COMPANY. } Chancery. No. 155.

To the honorable the judges of the circuit court of the United States for the eastern district of Texas, sitting in equity, at Galveston:

Asenath A. Ware, of the city and county of Montgomery, in the State of Alabama, widow, and a citizen of the said State of Alabama; David P. Lumpkin, of the said city and county of Montgomery and a citizen of the said State of Alabama; Mary A. Holtzclaw and James T. Holtzclaw, her husband, also of the said city and county of Montgomery and citizens of the said State of Alabama; Thomas W. Cowles, of Eufaula, in the county of Barbour and State of Alabama, and a citizen of the said State of Alabama, and Daniel O. White and Clement B. White, both of Buffalo Bluff, in the county of Putnam and State of Florida, and citizens of the said State of Florida, bring this their bill against the Galveston City Company, a private corporation aggregate duly established by and under the laws of the State of Texas and located and transacting business at the city of Galveston, in the county of Galveston, said State of Texas.

6 And thereupon your orators complain and say that on or about the fifteenth day of June, in the year of our Lord eighteen hundred and thirty-seven, one Michael B. Menard, claiming

and holding a league and labor, or four thousand six hundred and five acres, of land on the east end of Galveston island, in the territory of the then Republic of Texas, which league and labor of land is the site of the present city of Galveston, in the State of Texas, on behalf of himself and certain other individuals whom the said Michael B. Menard had previously associated with himself in the ownership thereof, but whose names are to your orators unknown, having as their purpose the founding and building of a town or city thereon, and Robert Triplett, Sterling Neblett, and William F. Gray, claiming interests in and to six hundred and forty acres, part of said league and labor of land, adverse to and in conflict with the claim of the said Menard and his associates, but having in contemplation the same object, with a view of promoting such common object and in order to reconcile such their conflicting interests and claims, entered into written articles of agreement, under their hands and seals, bearing date the day and year aforesaid and made or expressed to be made by and between the said Michael B. Menard, as party of the first part, the said Robert Triplett, Sterling Neblett, and William F. Gray, as parties of the second part, and Thomas Green, Levi Jones, and William R. Johnson, as parties of the third part, and thereby, after reciting such conflicting claims to said league and labor of land, and also that, by certain written articles of agreement entered into by and between the said Michael B. Menard and Robert Triplett, the said Menard had relinquished to the said Triplett the six hundred and forty acres out of the said league and labor of land claimed by said Triplett, on behalf of himself and the said Sterling Neblett and William F. Gray, and had, by deed duly executed by him, granted and conveyed the residue of said league and labor of land to the said Levi Jones, in trust, to be sold and disposed of by him in the manner and for the purposes prescribed in said deed, and the said Jones, intending to execute the trust created in him by said deed, had proposed to divide the said premises into one thousand shares, for which certificates were to be issued to the purchasers, and, in pursuance thereof, had actually issued certificates for four hundred shares, of which it was believed many shares had been sold, and also that the said Triplett, together with the said Menard, had, by deed duly executed by them, conveyed the said six hundred and forty acres of land to the said Thomas Green, Levi Jones, and William R. Johnson, to be sold and disposed of in the manner therein prescribed, and after further reciting that, it being the intention and in the contemplation of all the said parties to lay off said league and labor
7 of land into lots for the purpose of building a town thereon, it had been found most beneficial to all parties concerned that the whole of said league and labor of land should be held on joint account in the proportions thereinafter specified and should be under the control and at the disposition of the same set of trustees, acting upon one common plan in regard to the whole, instead of being held partly by the said Jones and partly by the said Thomas Green, Levi Jones, and William R. Johnson, under different titles and plans, it was witnessed that the parties thereto, in consideration of

the recitals therein, did mutually covenant and agree to and with each other, amongst other things, that the said league and labor of land should be conveyed to the said Thomas Green, Levi Jones, and William R. Johnson in fee simple as trustees and commissioners to execute and carry into effect the purposes, terms, and intentions of said agreement; that the said league and labor of land should, by the said trustees, be divided into one thousand shares, of which the four hundred shares for which certificates had already been issued by the said Jones should be regarded as four hundred shares, and the lawful holders of the said certificates should be on the same footing and entitled to the same rights with the holders of certificates issued under the present articles, and upon surrendering their said certificates new certificates in lieu thereof should be issued by the said trustees; that the remaining six hundred shares should be sold by the said trustees in such manner as they should think expedient, no share to be sold for a less sum than fifteen hundred dollars, unless a majority of said trustees should be of opinion that it would be expedient to reduce the price; that a certificate, signed by at least two of the said trustees, should be issued to every purchaser, who should have a right to demand a separate certificate for each share; that the certificates should be transferable by assignment made in writing thereon and signed and sealed by the holder, and acknowledged in the presence of two witnesses, before any justice of the peace or notary public; that the said trustees should, as soon as, in their opinion, a sufficient number of shares had been sold, call a meeting of the shareholders, at such time and place as should be designated by them, of which they should give sufficient and convenient notice to shareholders; that the said trustees should hold the title to the said league and labor of land thereby vested in them subject to the orders of the shareholders, as adopted at their general meetings, and the rules and regulations prescribed by them, and make all conveyances which the shareholders might require them to make, any two of them being authorized to make
8 conveyances and perform all other acts; and it was thereby further witnessed that the said parties of the first and second part, in consideration of the premises thereto, and the further consideration of the sum of ten dollars to them in hand paid by the parties of the third part, did thereby grant, bargain, sell, and convey unto the said Thomas Green, Levi Jones, and William R. Johnson, their heirs and assigns, the said league and labor of land in trust to execute the agreements thereinbefore set forth, as in and by the said written instrument, which your orators allege and charge is in the possession or power of the said defendant and which your orators pray may be fully and truly set forth in its answer to this bill of complaint or may be produced and submitted to your orators' inspection as this honorable court shall direct, will, on reference, appear.

Your orators further show that the said Thomas Green, Levi Jones, and William R. Johnson accepted the trust created in and by the said written instrument, and thereupon took upon themselves the discharge of the same; and the said trustees shortly

thereafter—that is to say, in or about the month of June of the year last aforesaid—having supplied themselves with one thousand printed certificates as the representatives of a like number of shares in the capital stock of said company, which certificates were bound into five books of two hundred certificates each, designated as Books A, B, C, D, and E, invited and solicited subscriptions for shares in said stock, and many persons, upon such invitation and solicitation, did apply for and become, for value, purchasers and owners of shares therein, to whom the said trustees issued a certificate of ownership for each share so purchased by them respectively.

Your orators further show that afterwards, to wit, on the thirteenth day of April, 1838, a large number of shares in the stock of said company having been sold and certificates of ownership thereof issued by the said trustees to the purchasers, the shareholders, on due notice given by the said trustees, held a meeting in the city of Galveston, Texas, and formally organized themselves into a joint stock company, under the name and style of Galveston City Company, by the election of a president and four directors, who were to constitute and be styled the board of directors of said company and to whom was confided the care and control of its property, with power and authority to pass and adopt ordinances, resolutions, and by-laws for the government of the company, appoint an agent, apply for charter of incorporation, require from the said trustees a deed for the league and labor of land held by them in trust for the shareholders, so as to vest the legal title thereto in the said board of directors and their successors, lay off the said league and
9 labor of land into blocks and lots, make sales thereof and convey title to the purchasers, declare dividends of the proceeds of such sales among the stockholders, and otherwise manage and control said property as they might deem best for the interest of the company; but your orators allege that the said trustees, with the approval and consent of said company, continued to make sales of shares in its stock, and that as many as one thousand, the number designated in said written articles, were eventually disposed of and certificates of ownership thereof issued by said trustees to the persons entitled thereto.

Your orators further show that David White, late of the city of Mobile, in the State of Alabama, but now deceased, in his lifetime, to wit, on the seventh day of November, A. D. 1838, subscribed for and, for valuable consideration by him fully paid and surrendered to the said trustees and by them accepted and received, became the purchaser and original owner and proprietor of sixty-seven shares in the capital stock of said company; in evidence of which the said trustees appointed under said written articles of June 15, 1837, thereupon issued and delivered to the said David White sixty-seven certificates of ownership duly signed by two of them, to wit, seventeen out of Book A, and numbered from one hundred and eight to one hundred and twenty-four, inclusive, and fifty out of Book C, and numbered from one to fifty, inclusive, and in the form and to the purport and effect following, to wit:

"City of Galveston in one thousand shares.

"The proprietors, M. B. Menard, Robert Triplett, Sterling Neblett, and Wm. Fairfax Gray, conveyed to the undersigned, as trustees, by their deed of the 15th of June, 1837, a league and labor of land containing 4,605 acres on the east end of Galveston island, to be sold as joint stock in 1,000 shares.

"By the terms of said deed certificates of shares when issued are to be assigned by endorsement under hand and seal, in the presence of two witnesses, before any justice of the peace or notary public.

"The trustees, any two of whom may act, are to call a meeting of the shareholders when deemed advisable.

"In the proceedings of the stockholders in general meeting each share to be entitled to one vote and to be represented in person or by proxy, and a majority in interest to determine all questions which may arise. The company may prescribe such rules and regulations for its government and management and give such orders and directions to the trustees for the sale of lots or any other purpose as it may think promotive of the general interest.

"*Certificate of Stock. Book* —, *No.* —.

"This is to certify that we, Levi Jones, William R. Johnson, and Thomas Green, trustees of the city of Galveston, in consideration of ——, do grant, bargain, and sell to David White, his heirs and assigns forever, one share, No. —, in the city of Galveston, to be holden and enjoyed by him and his assigns upon the terms prescribed in the deed bearing date the 15th of June, 1837, of M. B. Menard, Robert Triplett, Sterling Neblett, and William Fairfax Gray, constituting us the trustees, and in the agreement entered into between us and the stockholders in said city, as set forth in the proposal for subscription.

"Witness our hands this 7th day of November, 1838.

"LEVI JONES,
"THOMAS GREEN,
"*Trustees.*"

Your orators further show that afterwards, to wit, on the 31st day of December, 1838, at a regular meeting of the board of directors of said company held at the city of Galveston, an ordinance was passed by the said board requiring the agent of the company, as soon as a charter could be procured, or sooner if not had at the then session of Congress of the Republic of Texas, to open a book for registration and transfer of stock in the mode usually adopted by banks, and to give due notice of the opening thereof, and conferring the right on stockholders, after such notice, to file and register the certificates issued to them by the said trustees and receive in lieu thereof certificates, under the seal of the company, stating the number of shares to which the party was entitled, which last certificate should not be transferred except on the regular books of transfer of the company, and should be necessary in every case to entitle the share-

holder to receive the dividends due him; and also an ordinance requiring the trustees appointed under said written articles of June 15, 1837, to convey the said league and labor of land to Michael B. Menard, Mosely Baker, Thomas F. McKinney, William Hardin, and James Love, the then directors of said company, and their successors in office; that on the twelfth day of April, 1839, the said trustees, by their deed bearing date the day and year last aforesaid and duly executed and recorded, did, in pursuance of the ordinance last aforesaid, convey said league and labor of land in fee to the said directors, by virtue whereof the said directors became seized
11 and possessed of said league and labor of land in trust for the stockholders of said company; that afterwards the said Galveston City Company was incorporated under the same name by an act of the Congress of the then Republic of Texas, approved February 5, 1841, and that the said David White was one of the original corporators thereof.

Your orators further show that the directors of said company, in pursuance of their authority, did lay off said league and labor of land into blocks and lots, and did offer the same for sale, and have from time to time made sales and conveyances of numerous parcels thereof to different persons, receiving in part consideration therefor divers sums of money, aggregating a large sum, to wit, one million dollars and upwards, but that there remains of said league and labor of land a large portion yet unsold, of the value of five hundred thousand dollars and upwards; that the said company, shortly after its organization, adopted the policy of accepting from its stockholders shares of stock in exchange for its lands, and, in accordance with such policy, the said directors, in a large majority of the sales and conveyances of lots by them, accepted and received from the purchasers in payment therefor, instead of a money consideration, a surrender of shares in the capital stock of said company owned by said purchasers, in all such instances cancelling upon the books of the company the shares thus surrendered, and very many shares have been in that manner retired, until now, as your orators are informed and believe and therefore aver, there are, of the one thousand shares by which the capital stock of said company was originally represented, not more than fifty shares outstanding; and your orators also allege that no dividend of the cash proceeds arising from sales of said lands has ever been declared amongst the stockholders, although the same have always greatly exceeded the expenses of said company, but the profits thereof have been permitted to accumulate, and the market value of a share in the capital stock of said company now far exceeds the face value of such share, to wit, ten thousand dollars and upwards.

Your orators further show that, on or about the eighth day of April, 1839, the said David White, by an instrument in writing, under his hand and seal and bearing date the day and year last aforesaid, constituted and appointed one Abner S. Lipscomb his true and lawful attorney-in-fact, for him and in his name, amongst other things, to alien, assign, and transfer or convey any or all of his Galveston stock or any stock or interest he might have in the

city of Galveston, on Galveston island, in the then Republic
12 of Texas, thereby ratifying and confirming the acts of his said attorney in and about the premises in as full and complete manner as he, the said White, could if personally present, as by the said last-mentioned written instrument or by a certified copy thereof from the office of the clerk of the county court of Galveston county, Texas, where the same is duly of record, will when produced more fully appear; and the said David White thereupon delivered over to his said agent, for the purpose in said written instrument set forth, the said sixty-seven certificates of stock theretofore issued to him by the said trustees as aforesaid; and, further, that the said Abner S. Lipscomb afterward, to wit, on the third day of December, 1841, surrendered to the said company three certificates of shares in the capital stock of said company issued by the said trustees to the said David White as aforesaid and which were at the time in the possession of the said Lipscomb as the agent or attorney-in-fact of the said White, to wit, those numbered respectively 33, 36, and 39, out of Book "C," and with the consent and connivance of the said company and by an entry upon its books, but without authority and in fraud of the rights of his principal, the said David White, transferred the three shares of stock represented by the said three certificates into his individual and proper name of Abner S. Lipscomb, receiving from the said company in lieu of the three certificates so surrendered by him as aforesaid a certificate of ownership of said three shares of stock, issued under the seal of the company into his said individual name.

Your orators further show that afterward, to wit, on the 10th day of December, 1841, the said David White departed this life, leaving Mary S. White, his wife, and your orators, the said Asenath A. Ware, widow of Robert J. Ware, his daughter; Daniel O. White and Clement B. White, only children of his deceased son, J. Osborne White; David P. Lumpkin, only child of his deceased daughter, Lucy S. Lumpkin, and Thomas W. Cowles and Mary A. Holtzclaw, only children of his deceased daughter, Mary A. Cowles, his five grandchildren, his only heirs-at-law him surviving; that the said David White, the late ancestor of your orators, was at the time of his death possessed of and well entitled to a considerable personal estate, and particularly was possessed of a large number of shares in the stock of said Galveston City Company, of which he had become the original owner and proprietor as aforesaid, to wit, twenty-four shares, including the three shares hereinbefore alleged to have been by the said Abner S. Lipscomb fraudulently transferred into his own name; that twenty-one of the said twenty-four shares were at the time of the death of said decedent
13 standing in his name of David White on the books of the said company, and the certificates of ownership thereof issued to him by the said trustees as aforesaid, to wit, certificates numbered, respectively, 108, 116, 118, 119, 120, 121, 122, and 124, out of said Book "A," and certificates numbered, respectively, 10, 12, 27, 28, 34, 42, 43, 44, 45, 46, 47, 48, and 49, out of said Book "C," were at such time in the possession or power of his said attorney-in-fact, the same

never having been up to that time surrendered for new certificates under the seal of the said company; that the personal estate of which the said David White died possessed as aforesaid was, in amount and value, much more than sufficient, exclusive of said twenty-four shares of stock, to pay and satisfy his just debts and funeral expenses; that such, his debts and funeral expenses, have long since been fully paid and satisfied, and that there is no administration of said decedent's estate in the State of Texas nor is there any necessity for such administration.

Your orators further show that the said Mary S. White, relict of the said David White, departed this life at some time in or about the month of ——, in the year of our Lord eighteen hundred and fifty-three, without having assigned, transferred, or in any manner disposed of such right or interest in said twenty-four shares of stock as she possessed or was entitled to as the surviving wife of said David White, deceased, leaving your orators, the said Asenath A. Ware her daughter, and the said Daniel O. White, Clement B. White, David P. Lumpkin, Thomas W. Cowles, and Mary A. Holtzclaw, her five grandchildren, her only heirs-at-law her surviving, who as such and as the only heirs-at-law of the said David White, deceased, thereupon became and were and are entitled to have and receive the said twenty-four shares of stock to their own use.

Your orators further show that the said Abner S. Lipscomb, after the death of his principal, the said David White, and with the consent and connivance of the said company, and by an entry on its books, but without authority and in fraud of the rights of your orators, assigned and transferred the said twenty-four shares of stock to some person or persons to your orators unknown, the said company at the time of such transfer taking up and cancelling the said certificates of ownership thereof and delivering to the said transferees respectively new certificates issued under its seal into their own proper names and representing the shares in the stock of said company to be one thousand dollars each, signed by its president and countersigned by its agent, which last-mentioned certificates were in form and to the purport and effect following:

14 "*Galveston City Stock.*"

"Shares, $1,000 each.

—— Share. Renewed from certificate No. ——.

New series, No. ——.

Be it known that we, the president and directors of the Galveston City Company, do hereby certify that —— —— — entitled to —— share- in the Galveston city stock, on which —— thousand dollars have been paid. Transferable at the office of the company, in presence of the agent, at the city of Galveston, Texas, and the return of this certificate.

In witness whereof the president of the company here-
[SEAL.] unto affixed his signature, countersigned by the agent of the company, with the impress of their private seal, in the city of Galveston, this — ——, 18—.

—— ——, *President.*

—— ——, *Agent.*"

And your orators are informed and believe and they therefore aver that the said company subsequently procured said twenty-four shares of stock and the certificates corresponding thereto to be surrendered to it by those to whom the said Lipscomb had assigned and transferred them as aforesaid or by their assigns, at the same time cancelling said shares of stock upon its books, thus retiring each and every of said twenty-four shares, and is now claiming the benefit thereof; but your orators are advised and they respectfully submit that the transfer of said shares of stock by the said Lipscomb after the death of his principal, the said David White, was without lawful warrant and utterly void; that the said company is, in contemplation and construction of law, a party to the aforesaid illegal acts of the said Lipscomb and liable to complainants for all the consequences thereof, and that said company holds said stock in trust for your orators.

And your orators allege and charge that the said original certificates of ownership of said shares of stock issued to the said David White by the said trustees as aforesaid, as also the said stock books A and C, out of which the same were issued, and the certificate or certificates of ownership issued to the said Lipscomb by the said company for the three shares of stock hereinbefore alleged to have been fraudulently transferred by the said Lipscomb from the name of his principal, David White, into his own individual name of Abner S. Lipscomb, and the certificates of ownership for the twenty-
15 four shares hereinbefore alleged to have been transferred by the said Lipscomb after the death of his principal, the said David White, which were by the said company issued to the persons to whom the said Lipscomb had transferred said shares as aforesaid, and the stock book out of which the said company issued such certificates and the stock ledger showing the different transfers of said stock and the respective dates of such transfers and the different names in which said shares have at any time stood, and also the final cancellation thereof, and other books, writings, papers, and memoranda relating to said stock, are, or recently were, in the possession or power of the said company; and your orators charge that the truth of the matters and things hereinbefore set forth and charged in relation to said stock would appear in and by said books, certificates, writings, papers, and memoranda if the said company would discover and produce the same, but which it refuses to do, although frequently applied unto for that purpose.

And your orators further allege and charge that the said company and its agents and servants have always studiously concealed from your orators the aforesaid matters relating to the said stock of their ancestor, the said David White, and particularly the said illegal

acts of the said Abner S. Lipscomb and the said company's participation therein, by withholding from your orators all information in reference to said stock and persistently refusing them access to its books and papers containing a record and history thereof whenever applied to for that purpose, and your orators were in total ignorance of the aforesaid illegal acts of the said Lipscomb and of their rights in the premises until about twelve or fourteen months next before the bringing of this their bill; that your orators, except the said Asenath A. Ware, were at the time of the death of the said David White minors of tender age, and were all of them at that date and thence hitherto have been and still are residing in the States of Alabama and Florida, at a distance of eight hundred miles and upwards from the said city of Galveston, in the State of Texas, where the said company was then and thence hitherto hath been and still is located and transacting business, where also the said Lipscomb resided and where the said illegal acts were committed, and in truth your orators were not apprised even of the fact that their ancestor, the said David White, had in his lifetime owned shares in the capital stock of said company until the lapse of some years after his death, and that your orators, after they were apprised of such fact, to wit, on the — day of ——, 1869, and again on the 19th day of March, 1879,
16 at the said city of Galveston, by one Thomas J. Molton, their agent in that behalf, and also at divers other times and by divers other persons, made application to the said company, its agents and servants, for information as to what disposition, if any, had been made of the shares owned by the said White in his lifetime in the capital stock of said company, and also for permission to examine its books and papers containing a history and record of said shares of stock, for the purpose of ascertaining your orators' rights; but the said company, its agents and servants, have, upon every such application, declined to disclose to your orators any facts relating to said stock, and have also, upon every such application, refused and do still refuse unto your orators access to the books and papers of said company containing a record and history of said stock.

Your orators further show that the said Abner S. Lipscomb departed this life at some time in or about the month of December, in the year 1856, notoriously insolvent and without having accounted to your orators or any or either of them or any other person or persons authorized to represent them or the estate of the said David White, deceased, for said twenty-four shares of stock or any or either of them or any interest therein.

And your orators further allege that they have applied to the said company to cancel the alleged transfers of said twenty-four shares of stock and the entries of such transfers in its books and to revive said shares in the names of your orators, the said Asenath A. Ware, David P. Lumpkin, Mary A. Holtzclaw, Thomas W. Cowles, Daniel O. White, and Clement B. White, as the heirs-at-law of the said David White and Mary S. White, both deceased, and to enter the names of such your orators in its books as the owners of said stock and to issue and deliver to your orators certificates of ownership

therefor in the form adopted by said company since its formal organization; and your orators well hoped that the said company would have complied with such their reasonable requests, as in justice and equity it ought to have done; but now, so it is, may it please your honors, the said company absolutely refuses to comply with such your orators' requests; all which actings, doings, and refusals are contrary to equity and good conscience and tend to the manifest wrong, injury, and oppression of your orators in the premises.

In tender consideration whereof and to the end that the said defendant company may, according to the best and utmost of its knowledge, information, and belief, full, true, and perfect answer make to all and singular the matters aforesaid, but not upon oath nor affirmation, the benefit whereof is expressly waived by your orators;

17 And that the said defendant may set forth a list or schedule and description of every deed, book, account, letter, paper, or writing relating to the matters aforesaid or either of them, or wherein or whereupon there is any note, memorandum, or writing relating in any manner thereto, which now are or ever were in its possession or power, and may deposit the same in the office of the clerk of this honorable court for the usual purposes, and particularly may discover and produce the said written articles of agreement of June 15, 1837, and the deed of conveyance from the said trustees to the directors of said company for said league and labor of land, and the said original certificates of ownership of said stock issued to the said David White by the said trustees as aforesaid, and the said stock books "A" and "C" out of which the same were issued, and the certificate or certificates of ownership issued by the said company to the said Lipscomb for the three shares of stock hereinbefore alleged to have been fraudulently transferred by the said Lipscomb from the name of his principal, David White, into his own individual name of Abner S. Lipscomb, and the certificates of ownership for the twenty-four shares hereinbefore alleged to have been transferred by the said Lipscomb, after the death of his principal, the said David White, which were by the said company issued to the persons to whom the said Lipscomb had transferred said shares as aforesaid, and the stock book out of which the said company issued such certificates, and the stock ledger showing the different transfers of said stock and the respective dates of such transfers and the different names in which said shares have at any time stood, and also the final cancellation thereof, and that the said defendant may account for such as are not in its possession or power;

And that it may be declared that the alleged transfer of the *the* said three shares of stock by the said Lipscomb from the name of his principal, David White, into his own individual name of Abner S. Lipscomb and the entry thereof by the said company in its books and the issuing and delivery by said company to the said Lipscomb of a certificate or certificates of ownership of said three shares of stock was a fraud upon the said David White;

And that it may be declared that the alleged transfers by the said

Lipscomb of the said twenty-four shares of stock, after the death of his principal, the said David White, and the subsequent retirement or cancellation of said shares by the company were without lawful warrant and were and are absolutely void;

And that said twenty-four shares of stock may be declared to be the property of the estate of the said David White, deceased,
18 and that your orators, the said Asenath A. Ware, David P. Lumpkin, Mary S. Holtzclaw, Thomas W. Cowles, Daniel O. White, and Clement B. White, as his heirs-at-law and as the heirs-at-law of the said Mary S. White, deceased, may be declared entitled to have and to receive the same to their own use, and also entitled to share ratably with the other stockholders of said company in all accumulations of property of whatever nature by the said company since the date of said illegal transfers;

And that the said defendant company may be decreed to cancel said transfers and the entries thereof in its books and to revive the said twenty-four shares of stock and to enter the names of your orators, the said Asenath A. Ware, David P. Lumpkin, Mary A. Holtzclaw, Thomas W. Cowles, Daniel O. White, and Clement B. White, in its books as the owners of said stock, and to issue and deliver to such your orators a certificate of ownership for each of said twenty-four shares of stock at the face value of one thousand dollars each and in the form employed by said company since its formal organization;

And if the revival of said stock and the transfer thereof on the books of said company back into the names of your orators as aforesaid be found to be impracticable, then that the said company may be decreed to pay to your orators the market value thereof, and that your orators may have such other or further relief in the premises as the nature and circumstances of this case may require and as to your honors shall seem meet:

May it please your honors to grant unto your orators a writ of subpœna to be directed to the Galveston City Company, a corporation under and by the laws of the State of Texas and located and transacting business at the city of Galveston, in the State of Texas, whose president is John L. Darragh and whose agent or secretary is James P. Cole, both of whom are residents of said city and citizens of the State aforesaid, thereby commanding it, the said company, at a certain time and under a certain penalty therein to be limited, to be and appear before your honors in this honorable court, and then and there full, true, direct, and perfect answer make to all and singular the premises; and, further, to stand to, perform, and abide such further order, direction, and decree therein as to your honors shall seem agreeable to equity and good conscience.

MANN & BAKER,
M. C. McLEMORE,
GRESHAM & JONES,
Counsel and Solicitors for Complainant.

19 In the Circuit Court of the United States for the Eastern District of Texas, at Galveston.

Between—

ASENATH A. WARE and Others, Complainants,
and
THE GALVESTON CITY COMPANY, Defendant. } In Equity. No. 155.

The answer of The Galveston City Company to the bill of complaint of Asenath A. Ware, David P. Lumpkin, Mary A. Holtzclaw, and her husband, James T. Holtzclaw; Thomas W. Cowles, Daniel O. White, and Clement B. White, complainants, filed in the circuit court of the United States for the eastern district of Texas, at Galveston, on the 18th day of March, 1881.

This defendant, now and at all times hereafter saving and reserving unto itself all benefit and advantage of exception which can or may be had or taken to the many errors, uncertainties, and other imperfections in the said complainants' said bill of complaint contained, for answer thereunto or unto so much and such parts thereof as this defendant is advised is or are material or necessary for it to make answer unto, this defendant, answering, says that it claims all the benefit of demurrer and answer in the nature of demurrer to said bill for the want of equity on the part of said complainants as against this defendant which is apparent in the said bill; that complainants' alleged cause of action against this defendant and that of those under whom they claim accrued more than thirty-five years before the filing of their bill of complaint herein, and that no reasonable or sufficient cause or excuse is alleged why said suit was not earlier brought or why all the facts therein pretended to be known were not earlier discovered, nor is it shown in said bill when,
20 how, or in what manner any discovery of facts alleged not to have been before known or to have been concealed was made by complainants, nor any diligence whatever to ascertain the same, nor any excuse for the want of such diligence, nor any statement whatever as to the course of proceedings, or any facts connected with the administration of the estates of David White or of his wife, Mary S. White, in the State of Alabama, or as to the knowledge or acts of the proper legal representatives thereof in regard to the alleged rights and claims which are the subject of this suit, nor to remove the presumptions that all matters relating to the said stock and on which the rights and equities thereto were dependent were fully known to said representatives; and this defendant submits to the court, pleads, and alleges that complainants' cause of suit herein is barred by the law of limitations of the State and by the lapse of more than thirty-five years since the same accrued before said suit was brought, and the said law of limitations is now here pleaded in bar of said suit, and, further, that this suit has been delayed such great lapse of time and parties holding the certificates of stock alleged to have been issued in renewal of those which belonged to said White have many years ago obtained full value therefor in the property of the company, and the rights of third and

innocent parties as the only holders of the present alleged stock in said company have intervened and been permitted to grow up and become of great value, as shown in said bill. Wherefore complainants' cause of action is barred by such lapse of time and laches and is stale and inequitable and ought not now to be heard in a court of equity. Defendant further submits to the court that complainants do not show any right or equity in said bill, because they do not show that David White or Mary S. White died intestate nor the provision of the will of either of them, nor show any distribution of the property and rights of action of either of them in the State of Alabama, nor give any explanation whatever as respects administration on the estate of either of them in said State, nor lay any foundation for evidence of the right or claim of said complainants or any of them in this suit, and defendant claims all benefit and advantage of demurrer thereto.

And this defendant, further answering, says that it admits that written articles of agreement were made and entered into the 15th of June, 1837, between the parties and in substance in great part as shown in said bill; but this defendant, for greater certainty and fullness in that behalf, annexes to its answer and makes part thereof, as Schedule No. 1, a printed copy of said articles of agree-
21 ment, to be taken in lieu of any other admission thereof by this defendant and as if herein incorporated. This defendant further says that it has been informed and believes and therefore alleges that prior to said 15th of June, 1837, the said David White held a mortgage on said league and *and* labor of land to secure certain advances made or undertaken to be made by him for said Menard, and also claimed authority under said Menard to organize a joint stock company to hold the said league and labor of land and issue certificates of stock in said company, and had actually issued certain certificates under said claim, the authority and validity of which and the said pretensions of said White therefor were wholly denied by the said Menard, and that the recital in the said articles of agreement of 15th June, 1837, that said Jones had actually issued certificates for four hundred shares, of which it was believed that many shares had been sold, was in fact untrue and without any foundation whatever, but that the said Menard in and by said agreement was made the holder of two hundred out of said four hundred shares of stock to be issued by said Jones, Green & Johnson to enable him at his discretion and with full authority to effect settlements with said White and all others as to said certificates so issued by said White; and provision is therein made for settlement of the debt of Menard to White, stated to be less than fifty thousand dollars, though any such indebtedness was expressly guarded against assumption or any lien or security by virtue of said agreement. Proof of facts relating to said recital is now, after a lapse of 45 years and the death of all persons having cognizance of the facts, perhaps impossible, but the history and intent of said recital and of the said White certificates has been the subject of thorough judicial investigation and will be found in 42

Texas Reports of the Decisions of the Supreme Court of this State, pages 531 to 562.

This defendant admits the action of the said trustees in procuring and binding certificates in five books—A, B, C, D, and E—of two hundred certificates each, and the issuance of such certificates to parties entitled thereto, though Books A and C were delivered to said Menard and the certificates therefrom delivered out by him, and said books or the stubs thereof have never been in the possession of said company.

This defendant admits the formal organization of the company, unincorporated, by the election and action of president and directors in substance as alleged in the bill, and the disposition of the certificates of the stock of the company, signed by said trustees, except that the greater part of said stock was distributed to the original parties interested with Menard or their assigns after settlement with White and holders of White certificates.

22 This defendant does not admit, but, on the contrary, denies, any subscription for stock in said company by said David White or any payment therefor by him, except that on account of his said claims against said Menard, existing anterior to the formation of said company, but without any other payment or consideration by him, there were issued to and in the name of said David White and delivered to him by said Menard certificates for sixty-seven shares of the capital stock of said company signed by two of said trustees and in substance of the form stated in said bill.

This defendant admits the passage of the ordinance by the board of directors December 31, 1838, as alleged in said bill. Deed signed by Levi Jones and Thomas Green, the latter signing and acting by an attorney-in-fact, W. F. Gray, was made to the directors and on the date alleged in said bill, but to save and avoid all question as to the right of a trustee to act by attorney and as to the authentication of said deed for record at a later day title was made to said league and labor of land direct to the company, after its incorporation, by the assent of all in anywise concerned. This defendant does not admit it to be accurate or true that the Galveston City Company, which, prior to the 5th of February, 1841, was a private joint stock company, unincorporated, was incorporated on that date by an act of the congress of the Republic of Texas, but does admit and allege it to be true that the stockholders in said unincorporated company were on said date duly incorporated by said act of the congress of the Republic, and said act is referred to for greater certainty, and defendant admits the said David White to have been then one of the holders of stock and, in the language of the bill, one of the original corporators of said company.

This defendant admits that the directors of said company, in pursuance of their authority, did lay off said league and labor of land into blocks and lots and offer the same for sale, and have from time to time made sales and conveyances of numerous parcels thereof to different persons, but defendant denies that any such sum as a million of dollars or any reasonable approximation thereto has been received for the same. It admits that a large portion of said

land is yet unsold, situated so as not to be in demand by purchasers for any purpose at present except occasionally and at considerable intervals, the value thereof being almost wholly prospective and dependent on the growth of said city and on its being withheld from sale and not sold until and except as demand arises therefor. The present cash value of said remaining property is not believed
23 by defendant to be five hundred thousand dollars, or near that sum. Defendant says that the early practice of said company was to sell its property for cash and make dividends to its stockholders, but it was the subsequent policy, adopted at an early day, of selling its lands, except to defray expenses, only for the stock of the company, which stock was thereby extinguished and cancelled; and in accordance with such policy the said directors, in a large majority of sales and conveyances of lots by them, accepted and received from the purchasers in payment therefor, instead of a money consideration, a surrender of shares in the capital stock of said company owned by said purchasers, in all such instances cancelling upon the books of the company the shares thus surrendered, and that very many shares have been in that manner retired, and that of the one thousand shares by which the capital stock of said company was originally represented not more than forty-five (45) shares are now outstanding. The said twenty-four shares sued for are excluded from the number so outstanding. It is not true that no dividends of the cash proceeds arising from sales of said lands were ever made by said company among its stockholders; and defendant further says that said company has made sales and received therefor stocks in the Galveston Wharf Company, an incorporated company of said city, and bonds of the city of Galveston, and made dividends thereof amounting in market value to about nineteen hundred and eighty dollars on each share of stock, which has been distributed to all known and recognized stockholders of said company by order of said company nearly five years prior to the filing of this suit.

It is not true that the cash receipts of said company have always greatly exceeded the expenses of said company, and that the profits thereof have been permitted to accumulate. On the contrary, said company has been at times compelled to borrow or raise money and issue and sell its bonds therefor to pay taxes and other current expenses, and now has outstanding its bonds maturing March 1, 1889, the principal thereof amounting to forty-two thousand dollars, without funds for payment thereof, and secured by mortgage on almost the whole of the company's unsold property.

Defendant says that the value of a share of stock in said company, as quoted in the Galveston city newspapers at the present time, is, "bid, $9,000; asked, $9,500;" which defendant believes to be approximately correct, but if put upon the market in any considerable quantity or proportion would not equal that price, as defendant believes.

24 This defendant admits the execution of the instrument on or about and dated the 8th day of April, 1839, by the said David White to Abner S. Lipscomb, with the recital of powers and authority to said Lipscomb, as his attorney-in-fact, set forth in said

bill, but said instrument is on record in the office of the Galveston county clerk, and defendant prays leave to refer to a duly certified copy thereof for greater certainty as to the terms, conditions, and nature of the same.

This defendant does not admit the particular date of the delivery of any shares of stock in the Galveston City Company by said White to said Lipscomb, and does not admit the delivery of the whole of said sixty-seven shares by said White to said Lipscomb; but, on the contrary, defendant denies that said sixty-seven shares ever were so delivered, and alleges that a large number of the shares of stock which originally issued to said White were transferred and delivered by himself in his lifetime to other persons than said Lipscomb.

This defendant believes that the stock which was delivered by said White to said Lipscomb was delivered at different dates, but cannot state such dates, and leaves the complainants to their evidence thereof and claims the right, so far as may be material, to show the facts applicable thereto.

This defendant is informed and believes it to be true and therefore alleges that, as to all the certificates of shares of stock which issued originally to or in the name of said David White and which ever came to the possession or hands of said Lipscomb or under his control, the said White and Lipscomb had a joint interest as partners therein, and that the said power of attorney from said White to said Lipscomb, dated the 8th day of April, 1839, was, in fact, coupled with a joint interest in all said stock on the part of said Lipscomb.

Said White resided in Mobile, Alabama, and was a speculator and became interested with and under the said M. B. Menard in the enterprise of laying out and building up the city of Galveston on the said league and labor of land granted to said Menard by act of the congress of the Republic of Texas of the 9th of December, 1836, the seventh section of which enacted that David White, of the city of Mobile, be appointed special agent to carry into effect the provisions contained in the fourth section of said act, which required payment for said league and labor of land to be made in cash or approved acceptances to some authorized agent of the Government at New Orleans or Mobile, said act being here referred to for greater certainty.

Said White anterior to June 15, 1837, claimed the right to organize the company and issue and sell the stock thereof in said enterprise and did make sales of such pretended stock, and conflict arose between him and said Menard, who denied his powers therefor. The said agreement of June 15, 1837, and the action thereunder put an end to further proceedings by said White in the issuance and sale of what was known as the "White stock," and said White subsequently accepted the shares of the stock issued by said trustees and delivered to him by said Menard in settlement of the rights he had assumed and in settlement with Menard. The said Lipscomb had been the chief justice of the State of Alabama and was a lawyer of high professional and personal character. Re-

signing said office, he removed to the city of Mobile to practice law, where he was employed by said White in his controversy with Menard as to their respective rights to organize, issue, and sell the stock in said Galveston City Company. After said White accepted the stock in said company, so issued under the agreement of June 15, 1837, and delivered to him in settlement by Menard, the said Lipscomb resigned his seat in the legislature of Alabama, to which he had been elected from Mobile, and, upon agreement and understanding between him and said White of partnership in all said stock placed in his hands by said White, the said Lipscomb removed to and became a citizen of Texas, great inducement thereto being his said joint interest and partnership in said stock and his right to the management, control, and disposition thereof; and his disposition thereof, including all said shares of stock mentioned in complainants' bill, except share No. 108 out of Book A, which long prior thereto was endorsed and delivered by said White to John Rugely, was not only by virtue of his authority under said power of attorney to evidence his powers as respects third persons, but also of his joint interest and partnership therein coupled with said power.

The said Lipscomb soon after his removal to Texas became secretary of state of the Republic of Texas. He was a member of the convention which framed the constitution of the State of Texas in 1845 and became one of the first judges of its supreme court in 1846 and continued on the supreme court bench to the time of his death, in December, 1856, and bore the highest character of integrity and honor.

This defendant admits the surrender to said company on the 3d of December, 1841, of three certificates of shares of said stock which had been issued to said White, and that said surrender was made by said Lipscomb, and that said company thereupon issued three shares of stock therefor to and in the name of said Lipscomb. This defendant does not admit that said shares of stock at the time
26 were in possession of said Lipscomb as the agent and attorney-in-fact of said White, but claims and alleges the foregoing partnership right of said Lipscomb in said stock originally, and says further that the endorsement on the back of each of said shares of said stock is as follows in substance and effect:

"Abner S. Lipscomb, att'y-in-fact for David White."

The certificates of stock in said company issued by the trustees and known as trustees' stock, and including all the said twenty-four shares, which are the subject of said bill, passed currently by endorsement of the name of the holder thereof, in blank, thereon in all the business transactions of that day relating to said stock, and the company, by its uniform usage and practice, only required to be satisfied of the genuineness of the signature of such endorser to entitle the holder under him to the surrender of such certificate and to a new certificate of stock in his own name, if so desired. At what date said endorsements were made by said Lipscomb, or to whom the same may have been previously delivered by him, or what transactions may have taken place with other parties to whom the same may have been delivered, and through how many hands

it may have passed before return again to said Lipscomb, or the use thereof for the common benefit of the parties intended by him, or the express and particular authority or instructions of said White therefor, defendant does not know and cannot allege. No person now survives who was connected with its business or administration nor who had any connection with said stock or can be reasonably presumed to have any knowledge respecting the same. Its officers at that day were of the best business capacity and probity, with entire opportunities to know correctly the rights and powers of said Lipscomb as respects said stock, and this defendant claims the benefit of all the facts herein alleged and shown and of all reasonable presumptions after this great lapse of time to sustain said surrender and renewals of said stock. Said renewed shares of stock were endorsed, transferred, and delivered by said Lipscomb, but at what date or to whom defendant has no knowledge or information other than that on the 4th day of March, 1842, said shares of stock were surrendered to said company by James Love and cancelled by said company, and other certificates were issued to said Love in substitution therefor.

And this defendant, on its best knowledge, information, and belief, denies all the allegations in said bill that the transfer of said three shares of stock was in anywise without authority, fraudulent, or wrongful on the part of said Lipscomb, and expressly denies all the allegations therein of consent, connivance, lack of au-
27 thority, and fraud on the part of said company; and defendant further says that if the act of the said Lipscomb was in any respect wrongful this defendant was wholly ignorant thereof and of any participation therein, but had every reason to believe and be assured that the same was valid and in good faith on his part.

This defendant is ignorant as to the precise date of the death of the said David White, and can make no statement on belief respecting the same, but leaves the complainants to their proof thereof, claiming the right to show the fact correctly when so informed.

This defendant, further answering, says that it is informed and believes and therefore alleges that the said David White did not die intestate, but left his last will and testament duly executed by him, which was valid by the laws of the State of Alabama, in which he died domiciled, and was duly admitted to probate and record in the county of his residence, by which disposition was made of all the rights and interests herein claimed, if any such existed, which, however, is denied, wholly different from the pretended claim and descent of his alleged heirs-at-law as set forth in the bill; that, in fact, he left no heirs-at-law, having by his said will disposed of his entire estate and property, and whilst defendant is unable to state the terms and provisions of said will with certainty, upon its best information and belief it wholly denies the rights of the complainants herein as heirs-at-law of the said David White, as alleged, and insists that they shall not be heard in a court of equity on false allegations as to their pretended heirship, and defendant will claim and insist on complainants' obligation to prove such heirship, and to

negative the existence of a will, and defendant will claim and insist on its own right to prove the existence of said will and thereby defeat said suit, and if the same is in anywise material to its rights or interests herein to prove the terms and provisions of said will in this cause; that by said will his widow, Mary S. White, and his son-in-law, Robert J. Ware, became the executors thereof, and letters testamentary duly issued to them, or at least to the said Ware, who continued such executor to the time of his death.

Defendant has no reason to doubt the correctness of the names of the widow, daughter, and grandchildren of the said David White, as set forth in said bill; but has not such information as enables it to admit the same and leaves complainants to their proof thereof.

Defendant is ignorant as to the amount, kind, or value of personal estate left by the said David White, and leaves complainants to their proof as to same.

This defendant, on its best knowledge, information, and belief, denies that the said David White was possessed at the time
28 of his death of a large number of shares in the stock of said Galveston City Company, to wit, twenty-four shares specified in said bill, or any of them, of which he had become the original owner and proprietor, as alleged in the bill, or in any other manner; and in like manner denies also that the same or any of them were then in the possession or power of said Lipscomb; to the contrary thereof, this defendant believes on its best knowledge and information, and therefore alleges, that each and all of said twenty-four shares of stock had been validly assigned, transferred, and delivered by said White in person, or by said Lipscomb, anterior to the death of said White.

Answering, seriatim, as to said alleged certificates, defendant repeats its answer hereinbefore made as to numbers 33, 36, and 39 out of Book "C," and it says further that certificate No. 108 out of Book "A" was endorsed, transferred, and delivered by David White in person to John Rugely before the date of said power of attorney, to wit, on the 12th of November, 1838, said Rugely having been, as defendant is informed, one of the purchasers from said White of a so-called "White certificate," and such delivery no doubt intended to replace the same. Said Rugely retained possession of said certificate No. 108 out of Book "A," and did not obtain any renewed certificate in lieu thereof until July 6th, 1854.

Defendant further says that the following of said certificates out of Book "A," numbers 116, 118, 119, 120, 121, 122, and 124, and the following of said certificates out of Book "C," numbers 34, 42, 43, 44, 45, 46, 47, 48, and 49, were each and all endorsed, assigned, transferred, and delivered by the said Lipscomb, the endorsements thereon made and dated July 1st, 1841, in presence of Levi Jones and John P. Borden, the said Lipscomb signing the same with his name and as attorney-in-fact for said David White, except that No. 120 is signed Abner S. Lipscomb, att'y for David White. No. 34 was signed by mere mistake and inadvertence Abner S. Lipscomb, omitting said attorneyship. No. 44 was signed by like mistake and inadvertence "Abner S. Lipscomb, att'y-in-fact," omitting for said

White, and Nos. 45, 48, and 49 are signed by Lipscomb, att'y-in-fact for D. White. Said sixteen certificates were so endorsed and assigned in blank, and this defendant is wholly ignorant as to whom the same or any of them were so in fact assigned and delivered by said Lipscomb, such endorsements in blank having been common as to said stock at that day and always recognized and acted upon by said company on being satisfied of the genuineness and authority of said signature. Said endorsements frequently remained in
29 blank and were delivered from hand to hand in the course of business transactions, and not filled up with the name of any assignee or holder until it might so suit the wishes of some holder thereof to insert his name as the transferee or assignee of said certificate.

Certificate No. 10 out of Book "C" bears on the back thereof endorsement as follows: "I assign the within certificate to Ashbel Smith. David White, by Abner S. Lipscomb, att'y-in-fact." Witnesses: B. F. Tankersley, Geo. H. French.

The endorsement and witnesses thereto on No. 28, Book "C," are precisely similar.

The endorsement on No. 12, Book "C," is similar. Witnesses thereto: William Little, B. F. Tankersley, Geo. H. French, and another name, the second written, the surname of which is not legible or known to defendant.

The endorsement on No. 27, Book "C," is as follows: "I assign the within certificate to Levi Jones. David White, by Abner S. Lipscomb, att'y-in-fact." Witnesses: B. F. Tankersley, Geo. H. French.

This defendant believes and therefore alleges from the appearance of said endorsements of said certificates No. 10, 12, 27, and 28 that each and all of them were originally endorsed, transferred, and delivered in blank by said Lipscomb, and that after probably passing through various transferees and holders thereof the same, in due course of business and for value, were received by the parties, as shown in said endorsements, and they were filled up and made special, as now appears.

Said endorsements do not bear any date, but defendant believes and therefore alleges that each and all of said four certificates were endorsed, transferred, and delivered by said Lipscomb at a date anterior to the death of said David White.

Defendant further says that the surrender of said certificates to said company and the issuance of new certificates to parties holding the same did not take place until subsequent to the alleged date of the death of said White; the said sixteen certificates were surrendered by and certificates in lieu thereof issued to James Love March 4, 1842; said certificate No. 27 was surrendered by Levi Jones and certificate in lieu thereof issued to him September 9, 1844, and said certificates Nos. 10, 12, and 28 were surrendered to the company by said Ashbel Smith and certificates in lieu thereof were issued to him March 5, 1845.

This defendant, further answering, alleges and insists that if the endorsement, assignment, and delivery of said certificates or any of

them by said Lipscomb did not take place until after the death of said David White, which is in nowise admitted, but is ex-
30 pressly denied, the said Lipscomb had full right and power therefor by virtue of his partnership and joint interest in all said certificates and of his interest in all said certificates, coupled with his powers under said power of attorney; and defendant further says that the said David White well knew the mode and custom of the transfer of said certificates, as hereinbefore alleged; and defendant says that said company in good faith believed and has every reason to believe that said certificates were all transferred by said Lipscomb in the lifetime of said White, and if fraud or wrong was committed by said Lipscomb, which is in nowise admitted, but denied, said company was in nowise cognizant thereof or party thereto, but was imposed upon by the powers entrusted to Lipscomb, and received and cancelled all said shares of stock for the full value of each of them, the shares so issued in lieu thereof having been in all respects whatever full, legal, and perfect shares in said company, for which the holders received full value therefor or for subsequently substituted shares in the property of said company, in accordance with its custom and usage of exchanging or selling its property to the holders of stock therein, as shown by said bill; and that defendant is protected from all claim on the part of any claimants under said White, and that all such claimants are estopped in equity and good conscience, as well as at law, from all claim and demand against defendant in the premises. This defendant does not admit, but on its best information and belief it denies, that the debts of David White or of his estate were ever fully paid and satisfied; and, on the contrary thereof, on the statement by the executor of said White's last will the said estate proved insolvent for more than fifty thousand dollars.

In answer to the allegations in said bill that there is no administration of said decedent's estate in the State of Texas and that there is no necessity for such administration, this defendant says that soon after the death of said David White the executors of his last will in the State of Alabama, with full knowledge and information from the said Lipscomb of all matters in Texas, including said stocks in which the estate of said White had interest or claim, caused administration to be opened in the State of Texas on the estate of said David White, W. B. Lipscomb, the son of said Abner S. Lipscomb, having been the said administrator and his appointment as such by the probate court of Austin county in all respects legal. The estate of said White claimed a balance due from said M. B. Menard and the said administrator brought suit against said Menard, and also against Levi Jones, who was original trustee in the deed made by Menard to said Jones the 13th of April, 1837, for the
31 formation of a joint stock company and the sale of said league and labor of land, which deed is recited in said articles of agreement of June 15th, 1837, and contained a provision for the payment out of the first moneys received for stock in said company a certain debt due by said Menard to David White, of Alabama, of fifty thousand dollars, deducting from said sum the amount which

White had previously received, and in and by the said suit the said administrator sought to enjoin the operations of said company and prevent sale of any of said league and labor of land until payment of balance claimed from Menard; that Barry Gillespie, former partner of said Abner S. Lipscomb in the practice of law, a lawyer of known great ability and energy, was the attorney of the administrator in said suit. Said Menard made defence to said suit, and the same was subsequently dismissed.

And defendant further says that all the facts as to the disposal of all the stock of said company ever standing in the name of said David White by the said Abner S. Lipscomb were fully known to the executors of the said David White in the State of Alabama, and to all parties interested under his will and to the administrator on his estate in the State of Texas. There was no concealment of any fact whatever concerning said stock or concerning any matter in any manner appearing by its books, records, or papers on the part of said company, nor, as defendant believes and alleges, on the part of said Lipscomb, but the same were fully examined by and known to the said representatives of said estate and parties entitled under said will, and to agents and attorneys in their behalf; and with such full knowledge and information of all such facts no allegation of fraud, wrong, or error was made against said company nor any claim set up or pretended of liability or accountability on the part of said company for any of said shares of stock.

Whether said administration on the estate of said David White in this State was ever closed, and there is now no administration on said estate in the State of Texas, or the same is still open or pending, or whether no necessity exists for such administration, are matters which defendant submits to the court. He prays leave to show to the court all said proceedings in administration and the proceedings in said suit by said administrator, and claims all benefit and advantage therefrom.

This defendant is ignorant of the exact date of the death of said Mary S. White and leaves complainants to their evidence thereof, claiming the right to show the correct date of said death, when ascertained, should the same be in anywise material. This
32 defendant is ignorant as to whether the said Mary S. White in her lifetime never in any manner disposed of such right or interest as she had in said twenty-four shares of stock, as in that behalf is alleged in said bill, but defendant denies that she possessed any such right, and denies that she died intestate, and denies that the complainants were her heirs-at-law, as alleged in said bill, or as such heirs-at-law ever became entitled to have and receive said shares of stock or any interest therein, if the same had been held by said Mary S. White, which is denied.

Defendant alleges on its best information and belief that the said Mary S. White duly made and executed her last will, which was valid by the laws of Alabama, in which — she resided, and was duly admitted to probate and record in the county in which she died domiciled, and, as was also the will of said David White, was of valid effect and operation in this State as to any claim or right to

said shares of stock under her, whereby she disposed of her entire estate and property, making special devises and bequests thereof, and not leaving the same to go by operation of law; and if any right or interest in said shares of stock was in her, which is, however, wholly denied, the same was bequeathed by her wholly different from its descent by law, and from the pretended right and claim of the complainant herein. Defendant is unable to state the terms and provisions of said will, but alleges the fact of the making and existence thereof, and claims and insists that complainants should not be heard on false allegations of heirship and of rights thereby, and that thereby their suit should be defeated; and this defendant also claims the right to obtain full and precise information as to the terms of said will and prove the same so far as material to it in this cause.

This defendant repeats its denial, on its best information and belief, of the sale and transfer of said certificates of stock or of any of them by the said Lipscomb after the death of said White, and denies that any such sale or transfer when made was made by an entry on defendant's books. To the contrary thereof, sales of each and all said certificates when made were made by transaction between the parties alone and by endorsement and transfer of the respective certificates, to the validity and completeness of which sale no act of the company whatever was in any manner necessary, proper, or usual. The holder of a certificate purchased by him became thereafter entitled, if so disposed, to produce the same to the agent of the company, surrender it for cancellation and obtain a new certificate to and in his own name therefor. Defendant, in answer to the reiterated allegations in the bill of want of
33 authority, fraud, and wrong on the part of said Lipscomb and of the said company, repeats and renews its denials of such allegations in whole and in any and every part thereof as hereinbefore made, both as respects said Lipscomb and said company.

Defendant admits the form of a renewed certificate of stock in said company set forth in said bill to be substantially correct, but for greater certainty will submit to the court originals thereof, being of uniform character.

Defendant, further answering, denies the allegation to be true that the said company subsequently procured said twenty-four shares of stock and the certificates corresponding thereto or any of them to be surrendered to it by those to whom said Lipscomb had assigned and transferred them or by their assigns. It was matter of right, under the uniform rules and usage of the company, for the assignees of its certificates of stock to surrender the same and receive property therefor, as previously priced and offered to all stockholders by the company, or to receive new certificates of stock to and in their own name, the original or trustees' certificate in either case to be cancelled and thenceforth extinct, but all such acts have been of the seeking of such assignees and never in any instance or in any manner the procurement of the company. The company in all cases in accepting a surrender of stock gave full value therefor in its prop-

erty or by a new certificate of a share of stock binding the company, and the company accepted the surrender of each of said twenty-four shares of stock in good faith and with no doubt whatever or any information of any fact which could fairly cause doubt on the part of its then agent and official acting in the premises of the entire validity and sufficiency of each and every endorsement and assignment of said stock by said Lipscomb to transfer all right and interest therein on the part of said David White. The agent of said company throughout the time in question herein, Gail Borden, possessed the most capable business qualifications and undisputed integrity.

Defendant again denies the allegations repeated in the bill of the transfers of said shares of stock or any of them by said Lipscomb after the death of said White, and denies that such transfer was without lawful warrant or void, and denies that the company, in contemplation or construction of law, was or is party to any illegal act whatever, as alleged or otherwise, and denies that any of such transfers were illegal, and denies that there is any liability whatever on the part of the company to complainants therefor, and denies that said company holds or ever held said stock or any of it in trust for complainants or any of them.

34 Defendant admits and alleges that the originals of all said certificates for twenty-four shares of stock and of the certificates for shares of stock which issued on the surrender thereof, respectively, and of all subsequent renewals of any thereof until the final satisfaction of each and all of them in property of the company are in defendant's possession.

The original books, A and C, out of which said certificates for twenty-four shares of stock first issued, were never in possession of this defendant nor the stubs of said book-.

The date of endorsement, assignment, or transfer of trustee stock never in any manner appeared on any book or paper of the company unless such date was written or appeared on the certificate for such stock, no action of the company or any of its officials being requisite thereto by law or by any usage of the company. Such date, whenever in anywise material to the protection or interest of the company, was investigated, so as to satisfy the proper caution and prudence of the company at the time.

The stock ledger of the company contemporaneous with all said transactions is in possession of the company.

Defendant denies the existence at any time in its possession, control, or knowledge of any other book, writing, paper, or memoranda relating to said stock, and denies that the truth of any matter or thing whatsoever stated or charged in said bill and not herein admitted or stated would appear in whole or in part by any such book, certificate, writing, paper, or memorandum now or ever at any time in the possession or control or knowledge of this defendant.

This defendant, further answering, denies that said company, its agent or servant, has studiously or at all concealed from complainants or any of them or any other party the matters or any of them alleged in the bill relating to the stock of David White, or concealed

the said alleged illegal acts or any of them of said Lipscomb or the company's participation therein, because the said alleged acts, so far as charged to be illegal or wrongful on the part of said Lipscomb or the company, had no existence, and therefore the company did not and could not conceal them; and defendant also expressly denies that it has withheld from complainants all information in reference to said stock or has refused them access to its books and papers containing a record thereof, when applied to for that purpose, otherwise than as hereinafter explained and set forth; and defendant further says that up to the 21st of April, 1858, all its books, records, and papers were open for inspection and examination and for copies or memoranda therefrom by all persons whatsoever applying to the agent of the company therefor or for any information relating thereto; that from a period very soon after the death of said David White the executor of his last will and husband of the complainant, Asenath A. Ware, namely, Robert J. Ware, who was the active and interested representative of all the rights and interests of the estate of said White, personally and through agents and attorneys employed by him therefor, had unlimited, unrestricted access to all the records, books, papers, writings, and memoranda whatsoever of said company in any manner relating to said shares of stock or any other supposed rights, interests, or business of said David White or of his estate; and the said Ware so obtained full and complete memoranda, data, and details of all particulars thereof supposed to be in anywise material to him or his said agents or attorneys, and the same have ever since been in his possession and control and of the proper representatives of said interests. In particular, defendant alleges that soon after the death of said White the said Ware was furnished by the company with a statement showing the date of issuance of every share of stock ever issued to or in the name of David White and the date at which the holders of said stock surrendered the same to the company, and they were respectively cancelled by the company and substituted stock issued to such holders; that it was not until April, 1858, that the company ever in any manner withheld its records, books, or papers from examination by any person seeking the same. All the titles to property in Galveston having originally emanated from the company and deeds not having issued therefor for a considerable time after its organization, its directors became satisfied that its records were often used for purposes of unjust litigation and speculation and the disturbance of titles and rights long held in good faith, and on account of what they believed the good of the community and also to protect itself from unjust harrassment and litigation, of which, as it conceived, very signal instance had occurred, said company, on the 21st of April, 1858, adopted a resolution in substance as follows:

"Ordered that no person be hereafter allowed to inspect the books of the company except in the presence of the board of directors or by its order."

This defendant is ignorant of any application for any specific information on behalf of the complainants to said company and of the

alleged applications to said company on the — day of ——, 1869, and again on the 19th of March, 1879, by one Thos. J. Moulton, or of any of the other applications relating to said stock alleged
36 in said bill, and does not admit any of such applications and leaves the complainants to their proof on that subject; and defendant alleges that said complainants and all their agents and attorneys have always been in possession of the facts now stated as to the date of surrender of such stock—the allegations that the same was subsequent to the death of White being wholly unfounded and without any such information thereof.

This defendant is ignorant of the facts as to the alleged residence and ages of the complainants, and is ignorant as to whether the complainants were apprised of the fact that the said David White had in his lifetime owned shares in the capital stock of said company.

Defendant alleges that the fullest information as to said stock was in the possession of the representatives of said White, whose business and duty it was to obtain the same and give said complainants or any of them the benefit thereof, if the same had been desired; and defendant expressly pleads and alleges that the said bill wholly fails to give any reasonable excuse for the manifest laches of complainants in the premises, and that they ought not now — be heard in a court of equity therein; and defendant alleges that they did have all such information from the earliest period of their rights in said estate.

This defendant, further answering, admits the death of said Abner S. Lipscomb in December, 1856, but it expressly denies that he died insolvent, or so understood or reputed to be. On the contrary, defendant alleges that he died entirely solvent and left an estate of very considerable value (after payment of his debts) to his devisees.

Defendant also expressly denies that said Lipscomb died without having accounted to any one authorized to represent the estate of David White for said twenty-four shares of stock. On the contrary thereof, defendant alleges that the said Lipscomb did account to the said Robert J. Ware, the lawful executor of said David White, and to all parties in interest seeking information from him for and concerning all the said twenty-four shares of stock, except, perhaps, the one transferred by said White to said Rugely, and for and concerning all the said shares of said stock in said company ever standing in the name of David White and which came into the possession or control of said Lipscomb, and also for and concerning other interests and rights in lands and personal property in the State of Texas in which the estate of said White had interest and with which said Lipscomb had had connection. Defendant says that a large amount of said stock in the lifetime of said White was sunk and exchanged with the company for lots in the city of Galveston and became the joint property of Lipscomb and White, and the estate of said White
37 or those holding under it have realized said interest, thus recognizing the common partnership right and interest of said Lipscomb in the said stock. The said Lipscomb made other investments with said stock in lands in other localities in Texas

which he deemed of greater value and promise than Galveston, and fully accounted for the disposition by him of all said stock and said investments. The estate of said White had a large unsettled account with the Republic of Texas, as its agent, forming the basis of the claims against Menard, and the said Lipscomb and his law partner, Barry Gillespie, continued to be the counsel of said Ware to effect advantageous settlement with the State in its greatly depreciated currency and in prosecution of the claim against Menard growing out of the original schemes for said company and in said administration in Texas on the estate of said White at the request of said executor in Alabama.

This defendant is informed and believes and therefore alleges that the said Ware, as executor of the estate of said White, did set up claim of some amount or balance of debt or liability on the part of the said Lipscomb to the estate of said White growing out of the transactions of said Lipscomb concerning the disposition of the whole of said stock and other matters, but defendant is wholly ignorant as to the amount so claimed, and believes and therefore alleges that said claim was denied by said Lipscomb, and that the same was never prosecuted at law, although the said Lipscomb was fully solvent.

Defendant is also informed and believes and therefore alleges that said Lipscomb reported to said executor and admitted the liability of other parties to whom he had made transfers of some of said stock for the same or some interest therein to the estate of said White on account of the partnership interest of said White in all the stock placed by him in the hands of said Lipscomb, which claim was so received, accepted, and sought to be enforced by said executor. But defendant repeats the averment that the representatives and executors of the last will of said White and the administrator of his estate in Texas and all persons with any interest therein whatever had full and unreserved information of the disposition of all said stock by said Lipscomb and of all and every fact relating to said stock shown by the books or papers of said company, or free and unrestricted access thereto, and, whilst the facts were fresh and fully known to all parties then legally charged with the duty of obtaining, protecting, and enforcing all just claims and rights on behalf of the estate of said White, no claim or pretence whatever was set up of fraud
38 or wrong doing or even of error or mistake on the part of said company as respects the said stock or any of the shares thereof, or of claim in any manner against said company in trust or otherwise for or on account of said stock or any of the shares thereof. All the allegations in said bill of concealment by defendant in any manner in regard to said stock or of the want of means or facilities on the part of complainants to ascertain all facts which could in any manner be shown or disclosed by said company up to said order in April, 1858, have no semblance of foundation, nor have they in fact since that date. *Bona fide* applications for particular information have always been granted.

The said order and usage of the company are well and publicly

known, and are made a mere pretext for allegations, after great lapse of time, such as are contained in the bill.

This defendant further pleads and says that suit on the matters alleged in the bill has been forborne until all persons connected with the transactions to which it relates, knowing particular facts and details in regard to said stock and each share thereof and the receipt and appropriation of proceeds therefor, are dead, and defendant pleads the laches, neglect, and delay of said complainants in bar of this suit, and alleges that the same is stale and inequitable and ought not now to be further heard or considered.

Defendant is ready to produce, if desired, the original or a printed copy of the alleged conveyance to the directors of said company made the 12th of April, 1839.

Defendant admits its possession of said original certificates of stock, which are in bound books, including all the stock of said company surrendered to it, and cannot be separated from the other shares with which they are bound. Said books are deemed of special value and importance by this defendant.

Answer has been made fully in regard to all said stock, and defendant is ready to produce and prove the same, as it may be required to do in accordance with the rules of practice and evidence in this honorable court.

Defendant, for further answer and defense to said bill, says that it has been informed and believes and therefore alleges that the said Robert J. Ware, a citizen of Montgomery, Alabama, purchased for valuable consideration from each and all the complainants in this suit who, under the terms of the wills of David White and Mary S. White, had any right or interest whatever in the said stock which is the subject of this suit, provided any such right existed in said estates or either of them, and received transfer, including all such right, and became the sole and exclusive owner thereof. De-
39 fendant cannot give the date or particulars of said purchase and conveyance more particularly, the same being fully within the knowledge of said complainants, and notice is given to complainants to produce and show said conveyances, or secondary evidence will be produced if the originals cannot be obtained; and defendant expressly denies all right and title in the complainants and each of them in the subject-matter of this suit and any and every part thereof, and alleges sale thereof as aforesaid to the said Robert J. Ware many years ago and long prior to the institution of this suit.

And defendant, further answering herein, repeats its denial of any right or title of complainants herein or any of them in this cause as heirs or heirs-at-law of the said David White or the said Mary S. White, each of whom made his or her last will, duly probated and valid by the laws of Texas therefor, and devised all their estate and property whatsoever.

Defendant further says that shares of stock in said company at the time of the death of said David White did not exceed in value the sum of one hundred and fifty dollars per share, and continued at that market rate or at about one hundred and seventy-five dol-

lars per share up to the year 1854. Before the civil war they had considerably appreciated in value, and since the war at one time were of a market value of about $10,000. Their value is now quoted in the Galveston News at $9,000 bid, $9,500 asked. Said value has been hereinbefore explained.

Of all the known stockholders in said company no original stockholder has been for many years a stockholder therein. The certificates of the company from the earliest issuance thereof have currently passed from hand to hand by way of sale, security, and all the forms of dealing and transactions common to a commercial community.

The right of each and every holder of a share of stock in said company at the present time and the right of each and every purchaser of stock since the date of the cancellation by the company of the said twenty-four shares of stock respectively has been acquired on the belief, in good faith, of the extinction and non-existence of said twenty-four shares of stock, the holders of which obtained full value from the company therefor; and this defendant pleads and alleges that it would be most inequitable and unconscientious towards all the holders of the stock in the said company, after such great changes have taken place in the lapse of time, that said complainants should at this day set up their claim to said stock to the great injury and destruction of the rights of other stockholders which would thereby be produced, and says that complainants are barred and estopped therefrom.

40 And this defendant, further answering, says that by the statute of the limitation of action or suits in the State of Texas, passed in the year 1841 and ever since in force, all actions for personal property must be commenced and sued within two years after the cause of action accrued, and not after; all actions of debt grounded upon any contract in writing must be commenced and sued within four years next after the cause of such action or suit, and not after; and under said statute the longest period of limitation for suits or actions of any kind whatever was ten years; and defendant says that the said complainants' cause of action against it, if any they ever had, herein accrued more than ten years and more than thirty-five years before the filing of their bill in this cause, and that said statutes have not failed to be operative against said complainants on account of any exception therefrom contained therein within the principles of equity and good conscience restraining the same; and defendant renews its denial hereinbefore made of all concealment, fraud, or wrong charged in the bill on the part of defendant to prevent the running of said statute, and denies that any diligence has been shown or exists on the part of said complainants or any excuse for the lack thereof to prevent the running of said statute of limitations, and defendant pleads the same as a bar to complainants' suit, and further answers and pleads herein, as before pleaded, that the great lapse of time rendering impossible correct knowledge of facts at the present day, resulting from the death of all parties to these transactions, the laches of the complainants, and the *bona fide* accrual of the large and valuable

rights of the other stockholders in said company render the bill of complainants a stale, inequitable, and unconscientious demand which ought not now to be heard in a court of equity, and this defendant pleads the same in bar and estoppel thereof.

This defendant, further answering, says that since the preparation of the answer herein, and without sufficient time (being obliged to file the answer on the 15th) to redraft the same as to said matters, it has received information as — the time of the assignment of said certificates Nos. 10, 12, and 28 to Ashbel Smith, and is enabled to allege positively and does so allege upon information from said Smith, a gentleman well known and most honorably known in the history of the Republic and State of Texas, that said certificates were assigned to the said Smith at a date considerably prior to the alleged death of said David White. The letter of said Smith to the counsel of defendant on the subject is annexed hereto as Exhibit or Schedule No. 2 and made part of this answer as if the matters therein stated relating to said certificates were repeated and alleged herein.

41 And this defendant denies all and all manner of unlawful combination and all concealment, fraud, or wrong wherewith it is by the said bill charged; without this, that there is any other matter, cause, or thing in the said complainants' said bill of complaint contained material or necessary for this defendant to make answer unto and not herein and hereby well and sufficiently answered, confessed, traversed, and avoided or denied is true to the knowledge or belief of this defendant; all which matters and things this defendant is ready and willing to aver, maintain, and prove as this honorable court shall direct, and humbly prays to be hence dismissed with its reasonable costs and charges in this behalf most wrongfully sustained.

THE GALVESTON CITY COMPANY,
By J. L. DARRAGH,
President of said Company.

[SEAL.] J. P. COLE,
Agent Galveston City Co., with Seal of said Company Affixed.

BALLINGER & MOTT,
Counsel for Defendant.

42 In the Circuit Court of the United States for the Eastern District of Texas, at Galveston.

ASENATH A. WARE and Others
vs.
THE GALVESTON CITY COMPANY. } In Equity. No. 155.

SCHEDULE No. 1, ANNEXED TO ANSWER.

Ballinger & Mott, attorneys for defendant.

Articles of Agreement Between Menard, Triplett, Neblett, Gray, Green, Jones, and Johnson.

Articles of agreement made and entered into this 15th day of June, in the year of our Lord one thousand eight hundred and thirty-seven, between Michael Brandamour Menard, a citizen of the Republic of Texas, of the first part; Robert Triplett, Sterling Neblett, and William F. Gray, of the second part, and Thomas Green, Levi Jones, and William R. Johnson, of the third part.

Whereas the said M. B. Menard, by virtue of a conveyance from Juan N. Seguin, a grantee from the States of Coahuila and Texas, of the year 1832, and also by virtue of a grant from the Republic of Texas, made in consideration of the sum of fifty thousand dollars paid to the said Republic by the said M. B. Menard, claims title to a league and labor, or four thousand six hundred and five acres of land, situated on the east end of Galveston island, in the territory of the Republic of Texas; and whereas, the said Robert Triplett claiming and holding on behalf of himself and the said Sterling Neblett and William F. Gray, in proportions not specified, six hundred and forty acres, part of said tract of land called a league and labor, articles of agreement were entered into by the said Menard and Triplett, bearing date the eleventh day of April, 1837, by which the said Menard agreed to relinquish to the said Triplett six hundred and forty acres out of the said league and labor to be laid off in the manner therein prescribed; and whereas the said M. B. Menard, by deed or act bearing date the eighteenth day of April,
43 1837, and certified by Joseph Benzaken Marks, notary public in and for the city and parish of New Orleans, in the State of Louisiana, granted and conveyed the residue and remainder of the said league and labor of land, after deducting the said six hundred and forty acres, to the said Levi Jones, to be sold and disposed of by the said Levi Jones in the manner and for the purposes prescribed in the said act or deed, and the said Jones, intending to execute the trust created in him by the said act or deed, proposed to divide the premises into one thousand shares, for which certificates were to be executed to the purchasers, and in pursuance thereof the said Jones has actually issued certificates for four hundred shares, of which it is believed that many of said shares have been sold; and whereas the said Triplett, together with the said Menard, by deed, acknowledged before the said Joseph Benzaken Marks, and bearing date the eighteenth day of April, 1837, conveyed the said six

hundred and forty acres of land to the said Thomas Green, Levi Jones, and William R. Johnson, to be sold and disposed of in the manner prescribed therein; all of which above-recited matters will more fully and at large appear by reference to the said last three mentioned deeds or instruments; and whereas it being in the contemplation and intention of all parties in these presents that the said league and labor of land should be laid off into lots for the purpose of building a town thereon, and it being found most beneficial to all parties concerned that the whole of said league and labor of land should be held on joint account, in the proportions hereinafter specified, and should be under the control and at the disposition of the same set of commissioners or trustees, acting upon one common plan in regard to the whole, instead of being held partly by the said Jones and partly by the said Thomas Green, L. Jones, and W. R. Johnson under different titles and plans, whereby injurious competition and conflicts of interests may be produced:

Now, in consideration of the premises, the parties to these presents have mutually agreed and covenanted to and with each other as follows—that is to say:

That the said league and labor or four thousand six hundred and five acres of land shall be conveyed to the said Thomas Green, Levi Jones, and William R. Johnson in fee simple as trustees and commissioners to execute and carry into effect the purposes, terms, and intentions of this agreement.

That the said league and labor of land shall by the said trustees or commissioners be divided into one thousand shares, of which the four hundred shares for which certificates have already been
44 issued by the said Jones shall be regarded as four hundred shares, and the lawful holders of the said certificates shall be on the same footing and entitled to the same rights with the holders of certificates issued under the present articles, and upon surrendering their said certificates new certificates in lieu thereof shall be issued by the said commissioners or trustees.

That the remaining six hundred shares shall be sold by the said trustees and commissioners in such manner as they shall think expedient, but no share to be sold for a less sum than fifteen hundred dollars unless a majority of the said trustees should be of opinion that it would be expedient to reduce the price, a discretion therein being given to said trustees or commissioners. A certificate, signed by at least two of the said commissioners, shall be issued to every purchaser, who shall have a right to demand a separate certificate for each share or may embrace any number of shares in one certificate. The certificates shall be transferable by assignment made in writing thereon and signed and sealed by the holder and acknowledged in the presence of two witnesses before any justice of the peace or notary public.

The proceeds of sale shall be applied as follows: The expenses of the trust or commission shall be first deducted, and the balance shall be divided into three equal parts, of which one part shall be paid to the said Robert Triplett and those claiming under or through him, and the other two parts to be paid to the said M. B. Menard

and those claiming under or through him. It is, however, agreed between the parties that a sum not exceeding fifty thousand dollars shall be deducted out of the first proceeds of sale, after expenses paid, to be applied to the payment of a debt due from the said Menard to David White, of Mobile, Alabama, which debt is believed to be less than fifty thousand dollars; and no further payment shall be made by the trustees or commissioners to or on account of the said Menard or those claiming through or under him until a proportional sum—that is to say, one-third of fifty thousand dollars or of the sum applied to the payment of the said White, if a sum less than fifty thousand dollars should be so applied—shall have been paid to the said Triplett or those claiming by or through him. But in case a sum sufficient to repay to the said Triplett, or those claiming by or through him, his one-third part of the money applied to the payment of the said White should not be raised from the sales to be made by the said trustees, then the said M. B. Menard acknowledges himself to be indebted to the said Triplett, or those claiming by or through him, to the amount of one-third of the sum so applied to the payment of the said White, and promises
45 to pay the same. It is also expressly agreed that this stipulation for the payment of the said White is merely an agreement between the parties to these presents and not an acknowledgment of any liability on the part of said Triplett or those claiming by or through him to pay the debt due from the said Menard to the said White, or intended to create any lien in favor of said White, or to give any security for the payment of his debt, but is subject at all times to a rescission by agreement between the said Menard and the said Triplett and of those claiming by or through them.

It is further agreed that so much of the said four hundred shares for which certificates have been issued as aforesaid by the said Jones as now are in the hands of said Jones, or of any of the parties to these presents, or of their agents and subject to their control, shall not be sold for less than fifteen hundred dollars per share, unless the trustees or commissioners shall determine to reduce the price of shares as aforesaid; but if the price of shares shall be so reduced, then the price of what remains of the said four hundred shares may likewise be reduced, it being hereby agreed that what remains of the said four hundred shares shall at no time be sold for a less price than that demanded by the trustees or commissioners for the shares sold by them. It is further agreed that if the said Menard or those claiming through or under him or the said Triplett or those claiming through or under him should choose to become purchasers of shares, the trustees or commissioners shall not demand payment in cash for their purchases, but shall issue certificates to them or either of them and charge the same to their proportion of the amount to which they would be entitled in case the whole number of shares were sold: Provided, however, that their respective purchases so to be credited shall not exceed the amount to which they would have been respectively entitled.

The trustees or commissioners shall, as soon as in their opinion

a sufficient number of shares shall have been sold, call a meeting of the shareholders at such time and place as shall be designated by them, of which they shall give sufficient and convenient notice to the shareholders, but they shall not be bound to give other notice than by advertisement in the newspapers. At the meeting of the shareholders each share shall be entitled to one vote, and the shareholders may appear and vote by proxy. So much of the shares for which certificates have been issued by the said Jones as aforesaid as shall remain unsold shall be represented by the said Menard, and so much of the six hundred shares to be sold by the trustees as shall remain unsold shall be represented, as to two-thirds thereof,
46 by the said Menard, and as to the other third by the said Triplett or those claiming by or through him.

The trustees or commissioners shall hold the title to the said league and labor of land by these presents vested in them, subject to the orders of the shareholders as adopted at their general meetings and the rules and regulations prescribed by them. They shall make all conveyances which they shall be required to make by the shareholders as aforesaid; any two of them may make conveyances and perform all other acts; and in case of the death or refusal of either of the trustees to act, the other two may appoint a third in his place by writing, under their hands and seals. The trustees shall be responsible, each, only for his own acts and receipts.

Any sale made by the said Jones, or those appointed by him, of ten squares or parts of squares, or any less number, by virtue of the powers granted to him by the said Menard by the deed between them as aforesaid is hereby ratified.

The trustees or commissioners shall have authority to appoint all necessary agents for the sale of shares.

And, in consideration of the premises, the said Jones, Green, and Johnson do hereby release to the said Menard and Triplett all their right and title under the aforesaid deeds and conveyances, and the said Menard and Triplett, for and in consideration of the premises and for the sum of ten dollars, to them in hand paid by the said Green, Jones, and Johnson, the receipt whereof is hereby acknowledged, do give, grant, bargain, sell, release, and confirm the said league and labor of land unto them, the said Green, Jones, and Johnson; to have and to hold the same to them and the survivor of them and the heirs of the survivor of them, upon trust to execute the above-set-forth agreements of the parties to these presents; and the said M. B. Menard, for himself, his heirs, executors, and administrators, the above-granted league and labor of land unto the said Green, Jones, and Johnson and their assigns and the survivor and the heirs and assigns of the survivor shall, will, and doth warrant and forever defend by these presents.

In testimony whereof the parties to these presents have hereunto set their hands and seals the day and year first above written.

M. B. MENARD. [L. S.]
ROBERT TRIPLETT. [L. S.]
STERLING NEBLETT. [L. S.]
WM. FAIRFAX GRAY. [L. S.]
LEVI JONES. [L. S.]
THOMAS GREEN. [L. S.]

47 SCHEDULE NO. 2, ANNEXED TO DEFENDANT'S ANSWER.

Ballinger & Mott, counsel for defendants.

CEDAR BAYOU POST OFFICE, HARRIS CY., *June* 10, 1882.

Hon. Wm. C. Ballinger:

MY DEAR JUDGE: Your favor of May 12 reached Evergreen a few days since, during my absence at Huntsville. It has had a fate common to much of my mail matter, inexplicable delay—unless the mail bags are too heavy for the horse mail. Our mail contracts—some of them, at least—are attended with some intolerable nuisance or other, being taken by persons residing in other remote States.

I can answer what appears to me the leading inquiry in your letter. The shares of stock adverted to in your letter were certainly issued to me and delivered to me previously to Dec'r, 1841. I know this from unmistakable facts and about which there can be no shadow of doubt. I went to France from Galveston early in March, 1842, and that was a year or upwards after I bought the shares of city stock, and purchase and delivery to me were perfectly contemporaneous.

My impression is that they came to me through General Memucan Hunt. I believe I can ascertain this fact and exact dates by rummaging among my old papers and accounts. I will make the examination if desired by you. I write to you at once to avoid further delay.

Assuming the date Dec'r 10, 1841, as that of White's death, I know the transfer to me was long antecedent to his death.

I am unable to throw any additional light on the names of the witnesses—indeed, except for your mention, I have quite forgotten them. It is not necessary for me to say to you that any imputation on Judge Lipscomb's integrity or capacity for and knowledge of business sounds to me simply absurd.

Reading over what I have written—as to my "impression" in connection with General Hunt—I recollect General Hunt in connection with the purchase. Still I may have gotten them, the certificates of stock, directly from Judge Lipscomb. About the date antecedent to Dec'r 10, 1841, there can be no mistake.

Very truly yours, ASHBEL SMITH.

48 In the Circuit Court of the United States for the Eastern District of Texas.

ASENATH A. WARE *et als.*, Complainants,
vs.
THE GALVESTON CITY COMPANY, Defendant. } Chancery. No. 155.

Evidence in the Cause.

Oleander Printing Co., 63 Mechanic St.

"Filed Oct. 13th, 1885.

C. DART, *Clerk.*"

49 U. S. Circuit Court at Galveston.

A. WARE *et als.*
vs.
GALVESTON CITY COMPANY. } Chancery. 155.

C. Dart, Esq., examiner in equity:

You are hereby requested to act as examiner to take evidence in above cause and to fix time and place for so doing.

MANN & BAKER,
Solicitors for Complainants.

In accordance with rule 67, governing the practice in equity, as prescribed by the Supreme Court of the United States, I, C. Dart, examiner in equity, duly appointed by said court to take the oral examination of witnesses to be used in evidence in said court in equity causes, upon the foregoing request do hereby fix Thursday, the sixth day of July, 1882, at 10 o'clock a. m., as the time when, and clerk's office of the United States circuit court, in the city of Galveston, as the place where, such oral examination will be had; such examination to continue from thence and thereafter until the same shall be concluded. Notice of the time and place of such examination shall be given by the respective counsel or solicitors to the opposite counsel or solicitors or parties at least three days before the time fixed for the examination.

C. DART,
Examiner in Equity.

Galveston, Texas, July 3, 1882.

50 UNITED STATES OF AMERICA:

In the Circuit Court of the United States for the Eastern District of Texas.

ASENATH A. WARE and Others, Complainants,
v.
THE GALVESTON CITY CO. } No. 155. Equity.

Be it remembered that on this sixth day of July, in the year of our Lord one thousand eight hundred and eighty-two, I, C. Dart, an

examiner in equity, duly appointed by the circuit court of the United States for the eastern district of Texas, in the fifth circuit, under and by virtue of the rules of the Supreme Court of the United States in that behalf made, provided, and qualified under the laws of the United States to take depositions in equity causes for use in the courts of the United States, was attended at my office, at the clerk's office of the said circuit court, in the city of Galveston, by Geo. E. Mann, M. C. McLemore and S. W. Jones, counsel for and on behalf of the complainants in the foregoing entitled and numbered suit, and by W. P. Ballinger, counsel for and on behalf of the defendant in said suit, and by James P. Cole, a witness called by the complainants, the said time and place having been heretofore fixed by me, as appears by the application of the complainants and order thereon hereunto annexed, and due notice having been given Messrs. Ballinger & Mott of the said time and place more than three days before the time fixed for the examination, as stated in said order, the said Ballinger & Mott being the counsel of record for the defendant.

And the said witness, James P. Cole, being by me duly sworn to testify the truth, the whole truth, and nothing but the truth relative to the cause in caption named, testified as follows:

THURSDAY, *July* 6, 1882.

Examination-in-chief by complainants.

JAMES P. COLE sworn:

I am agent and *ex officio* secretary of the board of directors of the Galveston City Company and have been from the first of June, 1854. The official duties of agent of the company are, I understand to be, to take charge of its property, pay its taxes, make sales of lots, and as secretary of the board to make up and keeps its records and the records of the company, and am custodian of its books and papers. I have principally done the work of the office since 1854 in person. My impression is there were sixty-seven shares of the trustee stock issued to David White by the trustees of the original proprietors—that is to say, on examining the books I find seventeen shares issued to him out of Book A and fifty shares out of Book C.

51 The seventeen shares out of Book A were from 108 to 124, inclusive, and were dated November 7, 1838. The fifty shares out of Book C were from number 1 to number 50, inclusive, and were issued on the same day. All these certificates have been surrendered and are in possession of the company. I have now here all the trustee certificates mentioned in the answer of the defendant. The certificates numbered thirty-three, thirty-six, and thirty-nine, out of Book C, were surrendered by Abner S. Lipscomb on the third day of December, 1841, endorsed by him "Abner S. Lipscomb, attorney-in-fact for David White," and renewed to him, Lipscomb, on the same day in one certificate, number 274. The difference between the trustees' certificate and the company's renewed certificate was mainly this: The first was assignable by simple endorsement

and delivery, and the other was transferable only on the books of the company and in presence of the agent. The trustees' stock might pass through several hands without any knowledge on the part of the Galveston City Company or its officers. The renewed stock was entered upon its books and could not change ownership without its knowledge.

Question. What is your authority for saying that the original trustee stock or certificate could be assigned by simple endorsement without witnesses or an acknowledgement before a justice of the peace or a notary public?

Answer. I have no authority except the knowledge of the general custom of that day, and understood that the requirement on the face of the trustees' certificate of two witnesses and the authentication of a notary was for the protection of the company or party interested in the authenticity of the signature and might be dispensed with, as it was done in a great many instances.

The renewed certificate number 274, issued to Abner S. Lipscomb on the third day of December, 1841, besides the three shares, numbers 33, 36, and 39, Book C, originally issued to David White, included five other shares, to wit, 173, 174, 175, 176, and 177, originally issued out of Book E to John R. Triplett, making in all in that one certificate eight shares. Certificate number 108, Book A, was transferred by David White himself to John Rugeley, in presence of R. D. Johnson, notary public, on the twelfth day of November, 1838, and afterwards renewed to John Rugeley by myself as agent on the sixth of July, 1854. Certificate number 116, Book A, was assigned by "Abner S. Lipscomb, attorney-in-fact for David White," to James Love, in presence of Levi Jones and John P. Borden, witnesses, on the first of July, 1841, and afterwards renewed to James Love, March 4, 1842.

Certificate number 118 was endorsed in the same words and on the same dates as number 116.

Certificates number 119 and 121, 122, and 124 were also endorsed in the same way and of the same dates.

Certificate number 120 was endorsed like the others, except
52 that it is signed "Abner S. Lipscomb, attorney for D. White," leaving out the words "in fact."

Certificate number 10, out of Book C, is endorsed as follows: "I assign the within certificate to Ashbel Smith. David White, by Abner S. Lipscomb, attorney-in-fact." "Witness-, B. F. Tankersley, Geo. H. French." It was afterwards renewed to Ashbel Smith, March 5, 1845.

Certificate number 12, Book C, is endorsed as follows: "I assign the within certificate to Ashbel Smith. David White, by Abner S. Lipscomb, attorney-in-fact." "Witness-, William Little, P. J. (the surname I cannot make out), B. F. Tankersley, Geo. H. French." It was afterwards renewed to Ashbel Smith on March 5, 1845.

Certificate number 27, Book C, is endorsed as follows: "I assign the within certificate to Levi Jones. David White, per Abner S. Lipscomb, attorney-in-fact." Witness-, B. F. Tankersley, G. H.

French. It was afterwards renewed to Levi Jones, September 9, 1844.

Certificate number 28, Book C, is endorsed as follows: "I assign the within certificate to Ashbel Smith. David White, per Abner S. Lipscomb, attorney-in-fact." Witness-, B. F. Tankersley, Geo. H. French. It was afterwards renewed to Ashbel Smith, fifth of March, 1845. Certificate number 10 is renewed in number 471. Certificate number 12 is renewed in number 472, and certificate number 28 is renewed in number 473.

Certificate number 34, Book C, is endorsed as follows: "First of July, 1841, Abner S. Lipscomb, Levi Jones, John P. Borden," the names Levi Jones and John P. Borden being on the left-hand side, apparently as witnesses. Underneath these names, on the right-hand side, or, I should say, below these names, on the right-hand side, is the name "James Love." It was renewed to James Love, March 4, 1842; number of renewed certificate, 294.

Certificate number 42, Book C, is endorsed as follows: "First of July, 1841, Abner S. Lipscomb, attorney-in-fact for David White;" and on the left side, "Levi Jones, John P. Borden;" below, on the right hand, "James Love;" renewed to said Love, March 4, 1842, in certificate number 295.

Certificates number 43, 44, 45, 46, 47, 48, and 49, Book C, are all endorsed like number 42, above, except that in 44 Lipscomb signs "Abner S. Lipscomb, attorney-in-fact," without the name "David White."

In number 45 the name is written "D. White," and also in numbers 48 and 49.

In certificate number 34, above the signature is simply "Abner S. Lipscomb;" but these nine certificates, numbers 34, 42, 43, 44, 45, 46, 47, 48, and 49, Book C, all bear the same date, first of July, 1841, and are apparently witnessed by the same witnesses—Levi Jones and John P. Borden.

Question. Do the books or papers of the company show that David White ever owned any stock of the company other than the said 67 shares originally issued to him?

53 Answer. The books and papers show negatively that he never owned any other than the 67 shares issued to him out of Books A and C by the trustees already referred to, because if he had owned any other share it must have been of renewed stock and been entered into the stock ledger, whereas David White's name does not at all appear in that book. This declaration does not apply, however, to any trustees' certificates which may have been issued to another party and which may have passed through David White before reaching the company by surrender for renewal. Of this transaction I have already said that it could be done, and doubtless was done in many instances, without the knowledge of the company. I will only add that I know of none such in the case of David White, but I have never examined specially with a view to discover.

Question. Did the directors of the Galveston City Company, after its incorporation, make any rules and regulations as to the method

by which the holders of trustee stock should become entitled to receive certificates of stock from the company as chartered?

Answer. I am under the impression that the directors have from time to time passed orders on that subject, but never anything that could be called permanent regulations. I do not think that the directory or the stockholders have passed since the incorporation any rule upon the subject, but am not certain. I do not know how the practice of the company originated, whether by custom or by special enactment of either the stockholders or the directors, but it has not changed in the twenty-eight years that I have been agent. There appears upon the record of the minutes of a meeting of the directors held on the thirty-first day of December, 1838, among other orders, the following:

"Ordered that so soon as the charter of incorporation of the company can be procured, or sooner if it is not done during the present session of Congress, the agent be required to open a book for the registration and transfer of stock in modes similar to that usually adopted in the transfer of bank stock in order that the dividends arising from sales may be correctly and rightfully disbursed and paid over to the proper parties."

"Ordered that due notice of the time of opening the books of transfer shall be given, after which it shall be the duty of the holder of certificates to file and register them, receiving in lieu thereof a certificate under the seal of the company stating the number of shares to which the party is entitled, which last certificate shall not be transferable except on the regular books of transfer of the company and shall be necessary in every case to enable the shareholder to receive the dividend due to him."

And thereupon, by agreement of said counsel, the examination was adjourned until to-morrow morning at 11 o'clock, at the same place.

Attest:

C. DART,
Examiner in Equity.

54 FRIDAY, *July* 7, 1882—11 a. m.

Examination resumed pursuant to adjournment.

Present: Geo. E. Mann, S. W. Jones, and M. C. McLemore, counsel for complainants, and W. P. Ballinger, counsel for defendant, and the witness James P. Cole.

And thereupon the examination of the said witness was resumed in chief by complainants, and said witness, being duly sworn, testified as follows:

Certificate number 34 out of Book C, referred to above, was renewed to James Love, March 4, 1842, in certificate number 294, which was number 20 of the second series of renewed stock. I mean by "second series" out of the second book of blank certificates, but were of the same series.

A stock ledger account is an account of certificates of stock only that are owned by the individual stockholders and contains the

entry of the original number owned by each stockholder and those subsequently purchased by him, and also those sold by him from time to time. I have already said that the trustees' certificates are not entered upon the company's books until they are surrendered and merged into renewed certificates. As soon as the trustees' stock is surrendered and a new certificate issued for the same, that new certificate is entered in the stock ledger to the credit of the party receiving the same, and any subsequent change of ownership must be made on the transfer book of the company and goes from there into the stock ledger against the party selling and to the credit of the purchaser.

Of the trustees' stock there were originally 1,000 shares bound into five books of 200 shares each and marked A, B, C, D, and E. Of these the Virginia interest had Book E of 200 shares assigned to them in a compromise with the other proprietors. There were appointed by the proprietors three trustees, Levi Jones, Thomas Green, and Wm. R. Johnson; of these Levi Jones and Thomas Green signed all the certificates except those in Book E, which were signed by Wm. R. Johnson and Thomas Green. No certificate was ever signed by all three trustees. When the company was prepared for organization the trustees made a report of their action and to whom they had issued the certificates in their charge; they also returned to the office of the company stump books B, D, and E, but the other two books, A and C, have never been returned, and witness knows not what became of them. He has understood from his predecessor that these two books were placed in charge of M. B. Menard for some purpose of settlement with David White of claims which he had against M. B. Menard and which he was pressing against the company composed of the original proprietors, Menard and his nine associates. I would correct the above by saying that my understanding was that only one of these two books was delivered to Menard for the purpose assigned, but that he used stock out of both books for that purpose indiscriminately.

55 The Galveston City Company organized for business on Friday, the thirteenth day of April, 1838, "as contemplated in the deed of trust of twentieth of June" preceding. The last certificate in Book A was dated May 7, 1841. The first issue of renewed stock was certificate number 1, for 62 shares issued to McKinney & Williams, bearing date twentieth of May, 1839.

In the stock ledger there is no account opened with David White nor with Lipscomb and White, but there is an account of or opened with Abner S. Lipscomb. According to this account Lipscomb purchased from Levi Jones two shares of stock on May 5, 1841, and on July 21, 1841, he purchased five other shares of said Levi Jones, and on the same day five more shares of James Love. On the third of December, of the same year, he surrendered eight shares of trustees' stock, including shares numbers 33, 36, and 39 out of Book C, originally issued to David White, and received for them renewed certificate number 274 for the eight shares in his own name. These are, in all, twenty shares, and all the stock that ever stood in the name of Abner S. Lipscomb, so far as the books show. Of these

twenty shares he transferred to James Love, on the fourth of March, 1842, fourteen shares, in which were included the three shares alluded to above as issued to David White. He subsequently transferred one share to Gail Borden, Jr., January 17, 1844, and another share afterwards, January 16, 1845, to the Galveston City Company for property, leaving out of the twenty shares four shares still standing in his name at the time of his death, which were afterwards sold to Wm. Hendley & Co., two shares; to John M. Odin, one share; to J. T. Swearingen, one share, all under orders of the probate court, the last share being sold on the twenty-second day of March, 1875, which closed Judge Lipscomb's account.

On the twenty-sixth day of June, 1841, by the record, James Love was president and Levi Jones and Samuel M. Williams were directors. On the eleventh of January, 1842, by the same record, Samuel M. Williams, Levi Jones, P. J. Menard, and James Love appear to have been directors.

The sixteen shares which I have previously said were assigned by Abner S. Lipscomb to James Love on the first of July, 1841, and were afterwards renewed to said Love on the fourth of March, 1842, appear upon the stock account of said James Love as surrendered and renewed on that date, March 4, 1842.

As appears by the stock ledger, there stood to the credit of James Love on the ninth day of January, 1844, forty-four shares of stock.

On the fourth day of March, 1842, when James Love renewed the sixteen shares of trustees' stock which he had bought of David White on the first day of July previously (as appears by the endorsements in my possession), on the same fourth day of March, 1842, Abner S. Lipscomb transferred to said James Love fourteen other shares of renewed stock, to wit, from number 280 to 293, inclusive, making, in all, thirty shares credited to James Love in the stock ledger on that day.

56 And thereupon, the examination of the witness, James P. Cole, by the complainants not being concluded, his further examination, by consent of counsel, is suspended until such time as he may be recalled.

And thereupon, by consent of counsel, the examination was adjourned until to-morrow morning at 11 o'clock at the same place.

Attest:

C. DART,
Examiner in Equity.

WEDNESDAY, *July* 26, 1882—10 a. m.

Examination resumed by agreement.

Present: Geo. E. Mann, M. C. McLemore, and S. W. Jones, counsel for complainants, and W. P. Ballinger, counsel for defendant, and the witness, James P. Cole.

And thereupon the examination of the witness, JAMES P. COLE, was resumed, who, being duly sworn, testified as follows:

Examination-in-chief by complainants:

And, it being announced that there were certain books of the defendant company which it was necessary to examine before proceeding with the examination of the witness this day, thereupon, by agreement of said counsel, the examination was adjourned until such time as said counsel may agree that the same may be resumed.

Attest:

C. DART,
Examiner in Equity.

THURSDAY, *August* 10, 1882—10 a. m.

Examination resumed by agreement.

Present: Geo. E. Mann, M. C. McLemore, and S. W. Jones, counsel for complainants, and W. P. Ballinger, counsel for defendant.

And thereupon, the witness, JAMES P. COLE, being also present, his examination was resumed on behalf of the complainants, and the said witness, being duly sworn, testified as follows:

The last certificate belonging to the estate of A. S. Lipscomb was sold at public auction, under an order of the probate court, and was transferred by his executrix March 22, 1875. From an inspection of the transfer book I infer (I mean of the company) that the company was exceedingly loose in most of the transactions of that period. For instance, the first transfer of renewed stock and several subsequent transfers were made without a date, but from a memorandum of Gail Borden, Jr., the agent, I conclude the first transfer was made on the eleventh of October, 1839.

I find in the index to minutes the following, under the head of "James Love," which I suppose to be sufficiently reliable for all the purposes of the inquiry:

57 Elected director to fill McKinney's vacancy April 17, 1838.
Elected director 5th of November, 1839.
Elected director 7th of November, 1840.
Elected president 26th of June, 1841.
Elected president 23d of November, 1844.
Elected director 27th of November, 1845.
Elected president 29th of December, 1845.

From other sources M. B. Menard seems to have been first elected president on the thirtieth day of November, 1846, which I suppose terminated Col. Love's presidency. I do not remember the date of his, Col. Love's, death, but from information suppose it might have been in the year —.

From the same index, under the head of "Levi Jones," I learn that he was first made director eleventh of November, 1839, again on the seventh of November, 1840, and again on the twenty-third of November, 1844, and again in November, 1845, and in 1846 he died in this city; I do not remember the date of his death.

Gail Borden succeeded Dr. Levi Jones as agent about the thirteenth

of April, 1839, and continued agent up to the first of June, 1854, when this witness succeeded him. He died in the interior of the State; I do not remember the date.

I cannot say who was the attorney of the company in 1851, not being myself connected with it until three years afterwards. From 1861 to the present time Mr. W. P. Ballinger and those associated with him have been the general counsel of the company, Mr. Ballinger being considered its special adviser and the others being counselled only in his absence. In important suits the company has sometimes, on Mr. Ballinger's suggestion, employed other counsel to assist him.

There are forty-two shares of stock of the company now outstanding, including nine shares of trustees' stock that were never returned to the office. Three shares have been cancelled within the past thirty days. The nine shares trustees' stock now outstanding are not any of those reported as never issued by the trustees out of Book E.

The value of the unsold land of the company is very difficult to arrive at.

I estimate it by the number of shares outstanding and representing the property—say $470,000 in January last; the county assessed it for the last year at $550,000 for taxation, and the city of Galveston for the same year at $811,965. This, however, does not include a league and labor of land in Wharton county, called the Edgar league, which is claimed by the company. The "unsold land" spoken of lies altogether within the present limits of the city of Galveston.

I should say, from impression only, that about one-half in area of the original league and labor bought by Menard from the Republic of Texas, and perhaps nineteen-twentieths in value, have already been sold.

The company has never declared a dividend so far as I know.

58 Some years ago they sold some five wharf privileges to the wharf company for $200,000 of wharf company stock. They sold also block No. 321 to the city of Galveston for $35,000 in city bonds. These two amounts they partitioned out among the then known stockholders, reserving a sufficient amount for the unknown owners of the outstanding trustees' stock which had never been presented for renewal; but no part of said stock or bonds was "set aside for the stock sued for in this suit," those shares being considered as dead years before and buried in other city lots as they were selected by the various parties surrendering the shares alluded to. The partition alluded to above was made on the second of May, 1876, and each then existing share was entitled to receive forty shares of wharf stock and $700 in city bonds.

The three shares spoken of previously as having been cancelled within the past thirty days, two of them have been taken up in city prop-ty and one of them has been paid on account of a purchase by the Santa Fé Railroad Company of six wharf privileges lying to the eastward near the city hospital for nine shares of stock or its equivalent in money.

On the twenty-first day of April, 1858, the board of directors passed the following order: "Ordered that no person be hereafter allowed to inspect the books of the company except in the presence of the board of directors or by its order."

As to Wm. H. Sandusky's connection with the company, I can only speak from observation and information derived from others and to some extent from the records. From these sources I derive the impression, which I believe to be true, that Mr. Sandusky was employed by the company to draft the map of the city from plans furnished him by those who controlled the matter; his map was subsequently accepted, ratified, confirmed, and paid for. He was subsequently employed by the agent of the company to assist him in making up the records in the office and his handwriting appears in several of the books now in my possession; besides these I know of no other employmen- or coenection which Mr. Sandusky had from or with the company. The first map drawn by Wm. H. Sandusky bears upon its face the year 1838 and another map of his bears date 1843.

(Letter here presented to witness by counsel for complainants, which letter is herewith returned, marked "Exhibit A," as part of this testimony and identified by the signature of the examiner.)

The letter purports to have been written by Gail Borden, Jr., to Dr. Clement Billingslea on the twenty-third of June, 1843, and is recognized by me as being in the handwriting of Gail Borden, Jr.

59 EXHIBIT A.

Proved by James P. Cole. C. Dart, Examiner in Equity.

GALVESTON, 22*d June*, 1843.

Dr. Clement Billingslea.

DEAR BRO.: Your favor of twenty-fourth ultimo, by Mr. Barkley, was duly received, and the only reason of my not replying immediately was ill health and a press of custom-house business, which I was then closing.

I now give you a statement of such of D. White's stock as have been returned to this office, and also the lots sold Lipscomb & White.

I will, however, give you a transcript of the stock register:

Certificate.	No. of cert'c'e.	Date of issue.	By whom surrendered.	Remarks.
Book A	108	1838, Nov. 7		
"	109	" 7	Lipscomb & White	Cancelled for lots purchased.
"	110	" 7	A. S. Lewis	Renewed in certificate No. 16.
"	111	" 7	Same	Cancelled.
"	112	" 7	Amasa Turner	"
"	113	" 7	A. C. Crawford	"
"	114	" 7	Amasa Turner	"
"	115	" 7	Same	"
"	116	" 7	James Love	Renewed in certific. No. 303.
"	117	" 7	Amasa Turner	Cancelled.
"	118	" 7	James Love	Renewed in certific. No. 304.

Certificate.	No. of cert'c'e.	Date of issue.	By whom surrendered.	Remarks.
Book A	119	1838, Nov. 7	James Love	Renewed in certific. No. 305.
"	120	" 7	Same	" " No. 306.
"	121	" 7	Same	" " No. 307.
"	122	" 7	Same	" " No. 308.
"	123	" 7	Amasa Turner	Cancelled.
"	124	" 7	James Love	Renewed in certific. No. 309.
Book C	1	" 7	Lipscomb & White	Cancelled for lots purchased.
"	2	" 7	Same	" " "
"	3	" 7	Same	" " "
"	4	" 7	Same	" " "
"	5	" 7	Same	" " "
"	6	" 7	Same	" " "
"	7	" 7	Amasa Turner	Cancelled.
"	8	" 7	Lipscomb & White	Cancelled for lots purchased.
"	9	" 7	Same	" " "
"	10	" 7		
"	11	" 7	Lipscomb & White	Cancelled.
"	12	" 7		
"	13	" 7	Lipscomb & White	Cancelled.
"	14	" 7	James Love	"
"	15	" 7	James McKnight	Renewed in certific. No. 259.
"	16	" 7	James Love	Cancelled.
"	17	" 7	Same	"
"	18	" 7	Amasa Turner	"
"	19	" 1	James Love	"
"	20	" 7	Same	"
"	21	" 7	Same	"
"	22	" 7	Same	"
"	23	" 7	Same	"
"	24	" 7	Charles Power	Renewed in new cer. No. 213.
"	25	" 7	Same	" " No. 214.
"	26	" 7	Lipscomb & White	Cancelled for lots purchased.
"	27	" 7		
"	28	" 7		
"	29	" 7	James Love	Cancelled.
"	30	" 7	Charles Power	Renewed in new cer. No. 215.
"	31	" 7	Jas. Love & J. D. Groesbeeck.	Cancelled.
"	32	" 7	James Love	"
60				
"	33	1838, Nov. 7	Abner S. Lipscomb	Renewed in new cer. No. 274.
"	34	" 7	James Love	" " No. 294.
"	35	" 7	C. H. Pix	" " No. 209.
"	36	" 7	Abner S. Lipscomb	" " No. 274.
"	37	" 7	C. H. Pix	" " No. 210.
"	38	" 7	Lipscomb & White	Cancelled.
"	39	" 7	Abner S. Lipscomb	Renewed in new cer. No. 274.
"	40	" 7	Jas. Love & J. D. Groesbeeck.	Cancelled.
"	41	" 7	Gail Borden, Jr.	"
"	42	" 7	James Love	Renewed in new cer. No. 295.
"	43	" 7	Same	" " No. 296.
"	44	" 7	Same	" " No. 297.
"	45	" 7	Same	" " No. 298.
"	46	" 7	Same	" " No. 299.
"	47	" 7	Same	" " No. 300.
"	48	" 7	Same	" " No. 301.
"	49	" 7	Same	" " No. 302.
"	50	" 7	Lipscomb & White	Cancelled for lots purchased.

67 shares issued to D. White.
4 shares not surrendered, as seen in the foregoing, checked in red.
63 shares either cancelled or renewed in new certificates, as above.

Lots purchased by Lipscomb & White, by order of the board of directors, twenty-second of April, 1839; lots purchased twenty-ninth of August, 1839, at the prices annexed:

4 lots, Nos. 8, 9, 10, 11, in block No. 371, at $475 each	$1,900
14 lots, Nos. 1 to 14, in block No. 370, at $357 1/7 each	5,000
4 lots, Nos. 6 to 9, in block No. 668, at $2,000	8,000
7 lots, Nos. 8 to 14, in block No. 369, at $357 1/7	2,500
2 lots, Nos. 8 and 9, in block No. 626, at $1,500	3,000
1 lot, No. 2, in block No. 680, at $2,500	2,500
32 lots for	$22,900

The above sum was paid by the following shares stock, cancelled at $1,500 per share, to wit:

1 certificate, Book A, No. 109, issued to D. White 7th November, 1838.
5 " " " Nos. 164 to 168—these shares issued to Lipscomb April 21, 1839.
6 " " C, Nos. 1 to 6, issued to D. White 7th Nov., 1838.
2 " " " Nos. 8 and 9, issued to D. White 7th Nov., 1838.
1 " " " No. 26, issued to D. White 7th Nov., 1838.
1 " " " No. 50, issued to D. White 7th Nov., 1838.

16 shares, at $1,500 ---------- $24,000
Which balance has been transferred by Lipscomb & White to John S. Sydnor ---------- $1,100

The above is a correct statement from the books. David White does not own any renewed stock. Judge Lipscomb has six shares of the renewed stock, as shown by stock ledger.

The business has been done by Judge Lipscomb by power of attorney from D. White.

I would remark that the value of the lots in blocks Nos. 369, 370, and 371 has greatly depreciated in value. The lots in blocks 668, 626, and 680 are now worth more stock than was paid for them, or at least as much.

With respect to ascertaining Mr. White's true interest in the stock which may have been transferred, I am unable to inform you; the business being entrusted to Judge Lipscomb, it would be desirable to obtain a statement from him.

With respect to your landed interest in this country I
62 should rely on the advice of Messrs. Jones & Watrous, who have the reputation of honest men, as well as capable. Any services which I could render without subjecting myself to trouble in establishing claims I would be willing to render. I hope, however, as we now have the prospect of peace, some of your good

friends will see it to their interest to move to this country. Should be glad if you could yourself make it your interest.

Prospects for good crops this season are quite flattering, and upon the proclamation for an armistice our spirits are greatly revived.

Perhaps you may have heard that I resigned the collectorship of this port. Could not and would not carry out the provisions of the villainous law of the twenty-third of July last, requiring collectors to receive exchequers at their market price.

Bro. Huckins and family are well. He and his wife are now carrying on an excellent school.

If any further particulars you wish to know respecting the Galveston City Company please write and I will answer.

With great respect, I remain

Your friend and obedient servant, G. BORDEN, JR.

(Defendant objects to the said letter as evidence in this case.)

Counsel for complainants here offer in evidence a paper in two sheets, marked "Exhibit B" to this testimony and returned herewith identified by the signature of the examiner.

(Here follows table marked p. 61.)

(And said Exhibit B being exhibited to the witness, he testified as follows:)

I recognize the paper now in two parts as being in my own handwriting and as a true copy taken from a book in my office entitled "Historical Record of Galveston City Stock," the paper now presented being confined to the stock "originally issued to David White." The book from which this is a copy was compiled by me in 1854 from original entries, papers, certificates of stock, and the record generally. By the paper exhibited it appe-rs that all the original sixty-seven certificates of trustees' stock issued to David White had been surrendered and were then in the office of the company and must have passed through the hands and under the inspection of the witness. I can speak only from memory, but my recollection is that the exhibit was made out by me at the request of A. F. James, a director of the company, and, as I understood, the special agent of David White or his representatives at the time.

(It is agreed by counsel that the endorsement on the back of Exhibit B is in the handwriting of A. F. James, the said endorsment being as follows:

"Historical history of Galveston city stock originally issued to David White, taken from books of G. C. C., August 21, 1854.")

Testimony of witness JAMES P. COLE continued:

On the twenty-first day of August, 1854, James Love, A. S. Lipscomb, Gail Borden, Jr., and Amassa Turner were all living, but I think the last named had moved away from Galveston, but I am not sure of this.

63 Exhibit B shows that certificates numbers 31, 32, 40, and 41, Book C, had already been surrendered and cancelled. A certificate is said to be cancelled whenever it is surrendered and transferred to the Galveston City Company, upon which the party surrendering receives a credit of $1,000 stock, which either he or any other party, upon his order, can use in the purchase of lots from the company. I should say, however, that there were short periods of time in the history of the company at which stock was taken at $1,500 and at $2,000 and the parties surrendering credited with those amounts respectively.

In making up the statement hereto annexed and called Exhibit B I consulted only the books, records, and papers then in the office of the company, and where transfers were made professedly by attorneys did not think it worth while to look up the original letters of attorney.

(It is agreed by counsel that the certificates numbers 31, 32, 40, and 41, Book C, shall be produced, subject to the inspection of the court, on the trial of this cause, and subject also to the objection of the defendant that no evidence is proper in regard to the same, because no charge or allegation is made in relation to them or either of them in the bill and they are not matters of litigation in this suit and are immaterial in this case.

Testimony of JAMES P. COLE continued:

The transfers of trustees' stock were required by the terms of the certificate itself to be made before some notary and two witnesses, with the signature and seal of the party transferring the same, but this requirement seems to have been considered for the protection of the company itself, by proving the authenticity of the signature, and was apparently from the first disregarded and a simple endorsement by the party named in the body of the certificate was considered sufficient to transfer the title. This practice applies to a great many of the certificates surrendered during the early history of the company, and even this was in a few instances not required when the party to whom the stock originally issued himself surrendered it and desired to take property for it. In this latter case the simple delivery of the certificate was deemed sufficient to pass the title to the same.

In 1854 A. F. James, representing himself as the agent of David White's estate, made inquiry in the office of the company as to what rights and interest David White had in the company at the time of his death. The books, records, and papers were all opened to his inspection, and after having examined them to his satisfaction he requested a statement in writing which he could send abroad to the parties in interest, which statement is hereto referred to as "Exhibit B," already testified about. As to the extent of Mr. James' examination, the witness cannot state positively, being otherwise engaged in the business of the office and Mr. James being more familiar with the books, entries, papers, etc., than the agent himself was at the time.

64 Question. Did A. F. James examine the sixty-seven certificates of stock issued to David White then or at any other time?

Answer. I have already said that I do not know the extent of Mr. James' examination, but do not think that he could have examined the sixty-seven certificates originally issued to David White from the time occupied by him in his investigation; also, I do not suppose that he examined any of them, because I doubt if he could have found them without the assistance of the agent, and he was otherwise engaged, as I have said. As to any subsequent investigation, it may have occurred, but the witness does not remember the occurrence.

Some time subsequent to the passage of the order passed April 21, 1858, prohibiting the general inspection of the books of the company, Mr. Moulton came into the office of the company and asked to examine the accounts and transactions of David White and everything pertaining to the interest of his heirs. The agent referred him to the order alluded to, and possibly exhibited it to him as the reason why he refused the privilege asked for. Mr. Moulton afterwards made the same application, I think, in writing, which was never presented to the board of directors, because the agent was confident it would be refused.

I will not say that there was not a second demand made afterwards, some years afterwards, by Mr. Moulton, but have now altogether forgotten it, and do not know what became of the application. I understood Mr. Thomas J. Moulton as representing the heirs of David White, and formed the impression that he was a practicing attorney; also supposed that he might be connected with the heirs by marriage.

I had nothing to do with the preparation of the answer in this case nor furnished any material upon which it was based; was not at all consulted until it was signed by the president of the company and ready for filing, when the defendant's attorney read it to the witness. I do not wish to be understood, however, that the defendant's attorney had not full access to the records of the company, which he examined thoroughly from time to time with the assistance of the witness.

As to the connection between David White and A. S. Lipscomb, I can only speak from general rumor and impressions derived from Gail Borden, Jr., my predecessor; but of my own knowledge I know nothing.

The first I knew of David White was the mention of his name as agent of the Republic of Texas in the act of Congress selling the league and labor of land on the east end of Galveston island to M. B. Menard and appointing David White to receive and receipt for the purchase-money. In the year 1839, when I came to Texas, David White was known generally through the community as having business relations with the Republic of Texas and with M. B. Menard in his Galveston enterprise—altogether, I should say, a prominent character in that day.

J. P. COLE.

65 And thereupon counsel for complainants announces that they had concluded the direct examination of the witness, James P. Cole, and the counsel for the defendant desiring to cross-examine, by consent of counsel for both parties, the examination was adjourned until such time as said counsel may agree to resume the same.

Attest:

C. DART,
Examiner in Equity.

SATURDAY, *August* 26, 1882—10 a. m.

Examination resumed, pursuant to adjournment.

Present: Geo. E. Mann, M. C. McLemore, counsel for complainants, and W. P. Ballinger, counsel for defendant; and the witness, James P. Cole, being also present, thereupon his examination was resumed.

(It is agreed by counsel before the examiner that all the sixty-seven certificates of trustee stock issued to David White and the five certificates issued to A. S. Lipscomb, with all endorsements thereupon, shall be produced before the court on the trial of this cause for its inspection, being the same that have been referred to and produced in evidence before the examiner.)

And thereupon the witness, JAMES P. COLE, being duly sworn, testified as follows:

Cross-examined by counsel for defendant:

Up to the passage of the order of the board of directors in 1858, previously referred to in my direct examination, neither the plaintiffs nor any one representing them nor any other party were denied free access to the books, papers, records, or any other memorandum then in the office, and the agent, unless otherwise engaged, always proffered his assistance to aid them in their investigation. As far as I remember, I have already stated the only applications made in behalf of the David White interest, to wit, A. F. James, before the passage of the order, and Mr. Moulton, after its passage.

Since the beginning of the examination of this witness in the present case, the attorneys of both parties to the suit have been invited to the office of the company to inspect the books, records, papers, etc., and they have met there the attorneys of both sides once and the attorneys of the complainants twice afterwards, on which several occasions nothing was withheld from their inspection, and they were privileged to copy whatever they desired to preserve. They were all (complainants' attorneys) assiduously engaged in the investigation for several hours on these occasions, and thoroughly inspected the books of trustee stock, the agent furnishing the certificates as called for, and any other record or book or paper which they desired to see. The examinations by the counsel of the parties in the
66 office of the company, alluded to above, occurred previously to the last examination of this witness by the complainants and before the closing of the examination-in-chief.

At the request of defendant's counsel, I have prepared a full and detailed copy of all the endorsements, on not only the sixty-seven shares originally issued to David White, but of five other shares issued to Abner S. Lipscomb, but which Lipscomb endorses as if they were David White's stock and himself only the attorney of White, and witness asks that the statement be appended to his deposition as an exhibit.

Question by defendant's counsel. What acquaintance have you with the signature of Abner S. Lipscomb?

Answer. From personal knowledge, none whatever, but his name appears in a great many places and on many papers of different kinds in the office of the company, and from my familiarity with those signatures and their general uniformity I think I could recognize Abner S. Lipscomb's signature to any paper presented to me out of the office as genuine or otherwise.

Question by defendant's counsel. From your acquaintance with his signature, were the signatures to the endorsements on the seventy-two certificates spoken of made by him?

Complainants' counsel objects to the question and answer thereto because as to five of the certificates inquired about, originally issued to Lipscomb, they have not been introduced in evidence at all for any purpose, and as to the entire number, seventy-two, they are not now presented to the witness for his inspection, one at a time, and the witness is asked with respect to his opinion as to all of the signatures without the production of any of them, and because the witness has failed to qualify himself as familiar with the handwriting or signature of Abner S. Lipscomb and can speak only from the comparison of that which he presumes to be the genuine signature of Abner S. Lipscomb as a guide by which he is to determine the genuineness of the signature of Abner S. Lipscomb.

Answer. I have already stated what my acquaintance with Judge Lipscomb's signature is and how derived, but from the remarkable uniformity of the name, Abner S. Lipscomb, as it appears on these several endorsements, I should say they were all written by one man and must be all genuine or all spurious, and my opinion is that they are all genuine.

Question by defendant's —. Are these certificates in bound volumes, which are preserved as books and records of your company?

Answer. The certificates are in six different books, as I found them upon my entry into the office, in 1854, and seemed to have been put together, not according to their numbers, but, perhaps, according to the time at which they were severally returned into the office, either for renewal or cancellation. They are preserved in the archives of the office as the most important and valuable records in it.

67 The endorsements on the seventy-two certificates professedly go back to 1841, and there is no date later than 1841 connected with Abner S. Lipscomb's name. They are all certainly as old as the agency of the witness, over twenty-eight years.

The exhibit which I have prepared of the sixty-seven shares issued to David White contains four certificates not endorsed by Abner S. Lipscomb, but assigned by Amasa Turner, professing to be substituted as attorney for Abner S. Lipscomb, attorney-in-fact for David White, and I have added to the statement a copy of a power of attorney found on file in the office from Abner S. Lipscomb to Amasa Turner in regard to these four shares, and which was authenticated before Joseph Moreland, a notary public. These four shares are not alluded to in the comparison of Abner S. Lipscomb's signatures, one with another. The power of attorney spoken of is now to be found in a bound book entitled Powers of Attorney, and cannot easily be severed from the other powers in the volume.

And thereupon, by agreement of counsel, the examination was adjourned until Monday next, August 28, 1882, at 10 o'clock a. m., at the same place.

Attest:

C. DART,
Examiner in Equity.

MONDAY, *August* 28, 1882—10 a. m.

This being the day and hour appointed to resume the examination in this cause, there appeared W. P. Ballinger, counsel for the defendant, and the witness, James P. Cole, being too unwell to attend the examination this day, thereupon, by agreement of counsel, the examination was adjourned until such time as the said witness may be able to attend, or until such time as the counsel in the cause may agree to resume the same.

Attest:

C. DART,
Examiner in Equity.

THURSDAY, *September* 28, 1882—10.30 o'clock a. m.

Examination resumed, pursuant to adjournment.

Present: Geo. E. Mann, M. C. McLemore, counsel for complainants, and W. P. Ballinger, counsel for defendant, and the witness, James P. Cole.

And thereupon the said witness, JAMES P. COLE, being duly sworn, testified as follows:

(Cross-examination by defendant resumed:)

(Counsel for the defendant produced and exhibited to the counsel for the complainants the deed from the Galveston City Company to Ashbel Smith for lots 8 and 9, block 499, city of Galveston, dated July 10, 1840; consideration, $1,500, said deed being unrecorded.)

68 (And, by agreement, said deed returned to defendant's attorney.)

The counsel for the defendant here produced and exhibited to the witness a statement in writing, marked "Exhibit C," and identified by the signature of the examiner, the said statement in writing being

now offered in evidence by the defendant; and thereupon the said witness, James P. Cole, testifies as follows:

(The witness here presented to the examiner the "Exhibit C" referred to, and testified as follows:)

EXHIBIT C.

Proved by James P. Cole. Attest: C. Dart, examiner in equity.

Sixty-seven Shares Galveston City Stock Issued by the Trustees to David White and Five Shares Issued by the Same to Abner S. Lipscomb.

Book A, 108—Endorsed as follows: "I, David White, hereby transfer all my right, title, and interest in and to the within share of stock to John Rugeley, for value received of him, this 12th day of November, 1838.

"David White."

Executed and done before me, R. D. Johnson, notary public, Galveston, this 12th day of November, 1838.

R. D. Johnson. [Seal.]

Book A, 109—Endorsed by "David White;" also by "David White, per Abner S. Lipscomb, attorney-in-fact," and surrendered and cancelled 23d August, 1839.

Book A, 110—Endorsed as follows: "I transfer all my legal title and interest in and to the within share of stock to A. S. Lewis, for value received, 20th April, 1839.

"Abner S. Lipscomb,
"att'y-in-fact for David White."

Witness: R. D. Johnson, chief justice, *ex officio* notary public, Galveston Co.

Afterward renewed to A. S. Lewis, June 24th, 1839, and surrendered by Lewis and cancelled May 9th, 1840.

Book A, 111—Endorsed as follows: "I transfer all my right, title, and interest in and to the within share of stock to A. S. Lewis, for value received, 20th April, 1839.

"Abner S. Lipscomb,
"att'y-in-fact for David White."

Witness: R. D. Johnson, chief justice, *ex officio* notary public, Galveston Co.

Afterward surrendered by Lewis and cancelled July 19th, 1839.

69

Book A, 112—Endorsed as follows: "I transfer all my right, title, and interest in and to the within share of stock to Amasa Turner, for value received, this 20th April, 1839.

"Abner S. Lipscomb,
"att'y-in-fact for David White."

Witness: R. D. Johnson, chief justice, *ex officio* notary public, Galveston Co.

Book A, 113—Endorsed as follows: "I transfer all my right, title, and interest in and to the within to A. S. Lewis, for value received, 20th April, 1839.

"Abner S. Lipscomb,
"att'y-in-fact for David White."

Witness: R. D. Johnson, chief justice, *ex officio* notary public, Galveston Co.

For value received I transfer all my right, title, and interest in and to the within claim to A. C. Crawford & Co. this 11th May, 1839.

"A. S. Lewis."

Witness: Jas. C. Smith.

Book A, 114—Endorsed as follows: "I transfer all my right, title, and interest in and to the within share of stock to Amasa Turner, for value received, the 20th April, 1839.

"Abner S. Lipscomb,
"att'y-in-fact for David White."

"Teste: R. D. Johnson, chief justice, *ex officio* notary public, Galveston Co."

Book A, 115—Endorsed as follows: "I transfer all my right, title, and interest in and to the within share of stock to Amasa Turner, for value received, this 20th April, 1839.

"Abner S. Lipscomb,
"att'y-in-fact for David White."

Witness: R. D. Johnson, chief justice and *ex officio* notary public, Galveston Co.

Book A, 116—Endorsed as follows: 1st July, 1841.

Abner S. Lipscomb,
Levi Jones. att'y-in-fact for David White.
John P. Borden. James Love.

Book A, 117—Endorsed as follows: I transfer all my right, title, and interest in and to the within certificate of stock to A. Turner, for value received, 20th April, 1839.

Abner S. Lipscomb,
att'y-in-fact for David White.

Witness: R. D. Johnson, chief justice and *ex officio* notary public, Galveston Co.

70

Book A, 118—Endorsed as follows: 1st July, 1841.

Abner S. Lipscomb,
Levi Jones. att'y-in-fact for David White.
John P. Borden. James Love.

Book A, 119—Endorsed as follows: 1st July, 1841.

Abner S. Lipscomb,
Levi Jones. att'y-in-fact for David White.
John P. Borden. James Love.

Book A, 120—Endorsed as follows: Abner S. Lipscomb,
Levi Jones. 1st July, 1841, att'y for D. White.
John P. Borden. James Love.

Book A, 121—Endorsed as follows: 1st July, 1841.
Abner S. Lipscomb,
Levi Jones. att'y-in-fact for David White.
John P. Borden. James Love.

Book A, 122—Endorsed as follows: 1st July, 1841.
Abner S. Lipscomb,
Levi Jones. att'y-in-fact for David White.
John P. Borden. James Love.

Book A, 123—Endorsed as follows: I transfer all my right, title, and interest in and to the within share of stock to Amasa Turner, for value received, this 20th April, 1839. Abner S. Lipscomb,
att'y-in-fact for David White.

Teste: R. D. Johnson, chief justice and *ex officio* notary public, Galveston Co.

Book A, 124—Endorsed as follows: 1st July, 1841.
Abner S. Lipscomb,
Levi Jones. att'y-in-fact for David White.
John P. Borden. James Love.

Book C, 1—Endorsed as follows: David White,
per Abner S. Lipscomb, att'y-in-fact.

Book C, 2—Endorsed as follows: David White,
per att'y-in-fact, Abner S. Lipscomb.
David White.

Book C, 3—Endorsed as follows: David White,
per Abner S. Lipscomb, att'y-in-fact.
David White.

Book C, 4—Endorsed as follows: David White,
per Abner S. Lipscomb, att'y-in-fact.
David White.

71

Book C, 5—Endorsed as follows: David White,
per Abner S. Lipscomb, att'y-in-fact.
David White.

Book C, 6—Endorsed as follows: David White,
per Abner S. Lipscomb, att'y-in-fact.

Book C, 7—Endorsed as follows: I assign the within certificate to Amasa Turner. David White,
per Abner S. Lipscomb, att'y-in-fact.
Witness: William Little, P. J. Latham.

Book C, 8—Endorsed as follows: David White,
per Abner S. Lipscomb, att'y-in-fact.

Book C, 9—Endorsed as follows: David White,
per Abner S. Lipscomb, att'y-in-fact.

Book C, 10—Endorsed as follows: I assign the within certificate to Ashbel Smith. David White,
per Abner S. Lipscomb, att'y-in-fact.

Witness: B. F. Tankersley, Geo. H. French.

Surrendered for new stock 5th March, 1845.
Ashbel Smith.

Book C, 11—Endorsed as follows: Galveston, 8th August, 1840. For value received, we hereby transfer and make over the within share of stock to the Galveston City Company. David White,
per Abner S. Lipscomb, att'y-in-fact.

Witness: William Little, P. J. Latham, B. F. Tankersley, Geo. H. French.

Book C, 12—Endorsed as follows: I assign the within certificate to Ashbel Smith. David White,
per Abner S. Lipscomb, att'y-in-fact.

Witness: William Little, P. J. Latham, B. F. Tankersley, Geo. H. French.

Surrendered for new stock 5th March, 1845.
Ashbel Smith.

Witness: G. Borden, Jr., agent.

Book C, 13—Endorsed as follows: Galveston, 8th August, 1840. For value received, we hereby transfer and make over the within share of stock to the Galveston City Company. David White,
per Abner S. Lipscomb, att'y-in-fact.

Witness: William Little, P. J. Latham, B. F. Tankersley, Geo. H. French.

72

Book C, 14—Endorsed as follows: I assign the within certificate to Jas. Love. David White,
per Abner S. Lipscomb.

Witness: B. F. Tankersley, Geo. H. French.

For value received I transfer the within certificate to the Galveston City Company.
James Love.

Book C, 15—Endorsed as follows: I assign the within certificate to —. David White,
per Abner S. Lipscomb, att'y-in-fact.

Witness: B. F. Tankersley, Geo. H. French.

Transacted 25th October, 1841.

Book C, 16—Endorsed as follows: I assign the within certificate to Jas. Love. David White,
per Abner S. Lipscomb, att'y-in-fact.
Witness: B. F. Tankersley, Geo. H. French.
For value received I transfer the within certificate to the Galveston City Company.
Jas. Love.

Book C, 17—Endorsed as follows: I assign the within certificate to Jas. Love. David White,
per Abner S. Lipscomb, att'y-in-fact.
Witness: B. F. Tankersley, Geo. H. French.
For value received I transfer the within certificate to the Galveston City Company.
Jas. Love.

Book C, 18—Endorsed as follows: I assign the within certificate to Amasa Turner. David White,
per Abner S. Lipscomb, att'y-in-fact.
Witness: William Little, P. J. Latham.

Book C, 19—Endorsed as follows: I assign the within certificate to Jas. Love. David White,
per Abner S. Lipscomb, att'y-in-fact.
Witness: B. F. Tankersley, Geo. H. French.
For value received I transfer the within certificate to the Galveston City Co.
Jas. Love.

Book C, 20—Endorsed as follows: I assign the within certificate to Jas. Love. David White,
per Abner S. Lipscomb, att'y-in-fact.
Witness: B. F. Tankersley, Geo. H. French.
For value received I transfer the within certificate to the Galveston City Company.
Jas. Love.

73

Book C, 21—Endorsed as follows: I assign the within certificate to Jas. Love. David White,
per Abner S. Lipscomb, att'y-in-fact.
Witness: B. F. Tankersley, Geo. H. French.
For value received I transfer the within certificate to the Galveston City Company.
Jas. Love.

Book C, 22—Endorsed as follows: I assign the within certificate to Jas. Love. David White,
per Abner S. Lipscomb, att'y-in-fact.
Witness: B. F. Tankersley, Geo. H. French.
For value received I transfer the within certificate to the Galveston City Company.
Jas. Love.

Book C, 23—Endorsed as follows: I assign the within certificate to Jas. Love. David White,
per Abner S. Lipscomb, att'y-in-fact.
Witness: B. F. Tankersley, Geo. H. French.
For value received I transfer the within certificate to the Galveston City Company.
Jas. Love.

Book C, 24—Endorsed as follows: I assign the within certificate to J. McKnight. David White,
per Abner S. Lipscomb, att'y-in-fact.
Witness: William Little, P. J. Latham, B. F. Tankersley, Geo. H. French.
I assign the within certificate to Chas. Power.
Jas. McKnight.
Witness: G. G. Williamson, J. S. Sydnor.

Book C, 25—Endorsed as follows: I assign the within certificate to J. McKnight. David White,
per Abner S. Lipscomb, att'y-in-fact.
Witness: B. F. Tankersley, Geo. H. French.
I assign the within certificate to Charles Power.
Jas. McKnight.
Witness: J. S. Sydnor, R. P. Spier.

Book C, 26—Endorsed as follows: David White,
per Abner S. Lipscomb, att'y-in-fact.

Book C, 27—Endorsed as follows: I assign the within certificate to Levi Jones. David White,
per Abner S. Lipscomb, att'y-in-fact.
Witness: B. F. Tankersley, Geo. H. French.

74

Book C, 28—Endorsed as follows: I assign the within certificate to Ashbel Smith. David White,
per Abner S. Lipscomb, att'y-in-fact.
Witness: B. F. Tankersley, Geo. H. French.
Surrendered for new stock, 5th March, 1845.
Ashbel Smith.
Witness: G. Borden, Jr.

Book C, 29—Endorsed as follows: I assign the within certificate to Jas. Love. David White,
per Abner S. Lipscomb, att'y-in-fact.
Witness: B. F. Tankersley, Geo. H. French.
For value received I transfer the within certificate to Galveston City Co. Jas Love.

Book C, 30—Endorsed as follows: Abner S. Lipscomb,
att'y-in-fact for David White.
Attest: Joseph Baker.

Book C, 31—Endorsed as follows: For value received I hereby transfer and set over to John Buchanan the within one share of Galveston city stock. Galveston, May 4th, 1840. Amasa Turner,
*Substituted as attorney for
Abner S. Lipscomb, att'y-in-fact for
David White.

Attest: J. G. Burnham, G. Borden, Jr.

For value received I hereby transfer and set over to James D. Cocke the within one share of Galveston city stock. Galveston, May 5th, 1840.
Jno. Buchanan.

Attest: Nath'l Norwood, David Boren.

For value received I hereby transfer and set over to J. K. T. Walton the within share of Galveston city stock. Galveston, May 6th, 1840.
James D. Cocke.

Witness: Nath'l Norwood, E. W. Moore.

Galveston, Oct. 19th, 1840. For value received I hereby transfer the within one share of Galveston city stock to James Love and John D. Groesbeeck.
J. K. T. Walton.

Witness: H. M. Smyth, Johnson Gains.

75

Book C, 32—Endorsed as follows: For value received I hereby transfer and set over to John Buchanan the within one share of Galveston city stock. Galveston, 4th May, 1840. Amasa Turner,
†Substituted as attorney for
Abner S. Lipscomb, att'y-in-fact for
David White.

Attest: G. Borden, Jr., J. G. Burnham.

For value received I hereby transfer and set over to James D. Cocke the within one share of Galveston city stock. Galveston, 5th May, 1840.
Jno. Buchanan.

Attest: Nath'l Norwood, David Boren.

For value received I hereby transfer and set over to James Love the within one share of Galveston city stock. Galveston, 6th May, 1840.
James D. Cocke.

Attest: James Love.

I transfer to Galveston City Company, —th August, 1840. Jas. Love.

---

*See Lipscomb's power of attorney at the close of this statement.
†See Lipscomb's power of attorney.

Book C, 33—Endorsed as follows: Abner S. Lipscomb,
att'y-in-fact for David White.

Book C, 34—Endorsed as follows: 1st July, 1841.
Witness: Abner S. Lipscomb.
Levi Jones. James Love.
John P. Borden.

Book C, 35—Endorsed as follows: I assign the within certificate to Christopher Hodgson Pix.
Abner S. Lipscomb,
att'y-in-fact for David White.
Witness: J. S. Sydnor, Marcus Trumble.

Book C, 36—Endorsed as follows: Abner S. Lipscomb,
att'y-in-fact for David White.

Book C, 37—Endorsed as follows: I assign the within certificate to Christopher Hodgson Pix.
Abner S. Lipscomb,
att'y-in-fact for David White.
Witness: J. S. Sydnor, Marcus Trumble.

76

Book C, 38—Endorsed as follows: Galveston, 8th August, 1840. For value received, we hereby transfer and make over to the Galveston City Company the within share of stock. Abner S. Lipscomb,
att'y-in-fact for David White.
Attest: Joseph Baker.

Book C, 49—Endorsed as follows: Abner S. Lipscomb,
att'y-in-fact for David White.

Book C, 40—Endorsed as follows: For value received, I hereby transfer and set over to John Buchanan the within one share of Galveston city stock. Galveston, 4th May, 1840. Amasa Turner,
* Substituted as attorney for
Abner S. Lipscomb, attorney-in-fact for
David White.
Attest: G. Borden, Jr., J. G. Burnham.

For value received, I hereby transfer and set over to James D. Cocke the within one share of Galveston city stock. Galveston, 5th May, 1840.
Jno. Buchanan.
Attest: Nath'l Norwood, David Boren.

For value received, I hereby transfer and set over to J. K. T. Walton the within one share of Galveston city stock. Galveston, 6th May, 1840.
James D. Cocke.
Attest: Nath'l Norwood, E. W. Moore.

---

* See Lipscomb's power of attorney.

Galveston, Oct. 19th, 1840. For value received, I hereby transfer the within one share of Galveston city stock to James Love and John D. Groesbeeck.
J. K. T. Walton.
Witness: H. M. Smith, Johnson Lamar.

Book C, 41—Endorsed as follows: For value received, I hereby transfer and set over to John Buchanan the within one share of Galveston city stock. Galveston, 4th May, 1840.
Amasa Turner,
*Substituted as attorney for
Abner S. Lipscomb, att'y-in-fact for
David White.
Attest: G. Borden, Jr., J. G. Burnham.

For value received, I hereby transfer and set over to James D. Cocke the within one share of Galveston city stock. Galveston, 5th May, 1840.
Jno. Buchanan.
Attest: Nath'l Norwood, David Boren.

77

For value received, I hereby transfer and set over to Gail Borden the within one share of Galveston city stock. Galveston, 6th May, 1840.
James D. Cocke.
Attest: Jas. Love.

For value received, I transfer this share stock to the Galveston City Company, 13th August, 1840.
G. Borden, Jr.

Book C, 42—Endorsed as follows: 1st July, 1841.
Abner S. Lipscomb,
Levi Jones. att'y-in-fact for David White.
John P. Borden. James Love.

Book C, 43—Endorsed as follows: 1st July, 1841.
Abner S. Lipscomb,
Levi Jones. att'y-in-fact for David White.
John P. Borden. James Love.

Book C, 44—Endorsed as follows: 1st July, 1841.
Levi Jones. Abner S. Lipscomb, att'y-in-fact.
John P. Borden. James Love.

Book C, 45—Endorsed as follows: 1st July, 1841.
Abner S. Lipscomb,
Levi Jones. att'y-in-fact for D. White.
John P. Borden. James Love.

Book C, 46—Endorsed as follows: 1st July, 1841.
Abner S. Lipscomb,
Levi Jones. att'y-in-fact for David White.
John P. Borden. James Love.

---

*See Lipscomb's power of attorney.

Book C, 47—Endorsed as follows: 1st July, 1841.
Abner S. Lipscomb,
Levi Jones. att'y-in-fact for David White.
John P. Borden. James Love.

Book C, 48—Endorsed as follows: 1st July, 1841.
Abner S. Lipscomb,
Levi Jones. att'y-in-fact for D. White.
John P. Borden. James Love.

Book C, 49—Endorsed as follows: 1st July, 1841.
Levi Jones. Abner S. Lipscomb,
John P. Borden. att'y-in-fact for D. White.

Book C, 50—Endorsed as follows: David White,
per Abner S. Lipscomb, att'y-in-fact.

78 *Five Shares of Trustees' Stock Issued to Abner S. Lipscomb 21st April*, 1839.

Book A, 164—Endorsed as follows: David White,
per Abner S. Lipscomb, att'y-in-fact.

Book A, 165—Endorsed as follows: David White,
per Abner S. Lipscomb, att'y-in-fact.

Book A, 166—Endorsed as follows: David White,
per Abner S. Lipscomb, att'y-in-fact.

Book A, 167—Endorsed as follows: David White,
per Abner S. Lipscomb, att'y-in-fact.

Book A, 168—Endorsed as follows: David White,
per Abner S. Lipscomb, att'y-in-fact.

(Copy.)

Power of Attorney from Abner S. Lipscomb to Amasa Turner.

REPUBLIC OF TEXAS,
City of Austin.

Know all men by these presents that I, Abner S. Lipscomb, have and by these presents do nominate, constitute, and appoint Amasa Turner, of the city of Galveston, my substitute as attorney-in-fact for David White for the purpose of transferring and assigning to John Buchanan four shares of Galveston stock, on the condition that the said John Buchanan shall deliver to the said Amasa Turner twenty shares of San Leon stock, duly transferred and assigned to me.

In witness whereof I have hereunto set my hand and seal this twenty-fifth day of February, anno Domini 1840.

ABNER S. LIPSCOMB.

THE REPUBLIC OF TEXAS,
County of Travis.

Before me, Joseph Moreland, a notary public in and for the county and Republic aforesaid, duly commissioned and sworn, personally came and appeared the citizen Abner S. Lipscomb, who acknowledged on oath that he signed the within and foregoing instrument for the purpose therein contained.

In faith whereof I hereunto subscribe my name and affix my notarial seal, at the city of Austin, on this the twenty-sixth day of February, 1840.

JOSEPH MORELAND,
Notary Public.

79 OFFICE GALVESTON CITY COMPANY, *August* 15, 1882.

I certify that the above and foregoing statement, occupying eighteen pages, is a true and correct copy from original papers and documents now in this office and in my possession as agent of the Galveston City Company.

J. P. COLE,
Agent Galveston City Company.

This exhibit comprises every share of stock that was ever issued by the trustees to David White and to Abner S. Lipscomb, to wit, seventeen (17) shares out of Book A and fifty (50) shares out of Book C to David White and five (5) shares out of Book A to Abner S. Lipscomb, and exhibits a true and correct copy of the endorsements on the backs of said seventy-two (72) certificates, as carefully as I could transcribe them; also a copy of the power of attorney from Lipscomb to Amasa Turner, under which four of said certificates were assigned.

(Counsel for complainants object to the introduction of the said exhibit as evidence, because the same is, as it purports to be, a copy of originals in possession of the defendant, and the originals are the best evidence of the truth of the matters undertaken to be established.)

(The said "Exhibit C" is returned herewith as a part of the testimony in this cause.)

Testimony of JAMES P. COLE resumed, on cross-examination:

Since these original records have been in my possession as agent of the company there has been no change or alteration whatever in any of said endorsements or in any entry, record, proceeding, or paper in the office relating to the stock of David White, except only the certificate which David White sold to John Rugeley and which John Rugeley surrendered to me for renewal. I have never meddled with any other of the David White stock, nor has any other person, but they are to-day precisely as I received them on the first of June, 1854, and in the same places—that is to say, arranged in the several books as I received them.

I have never heard anything nor have I any reason to suspect

nor have I ever suspected that there was any change whatever made in or upon said certificates nor in any record concerning them by any one since they were first received and filed away.

I am confident that since I have been agent no paper, record, memoranda, or entry whatever has been withheld from any party having an interest in knowing and properly applying for such information, nor, so far as I am aware, was any such information withheld by any predecessor of mine in the office. I have always so construed and carried out the order of April 21, 1858, prohibiting the unrestricted inspection of the books, etc., as to make the
80 inspection myself, giving the result thereof to the parties applying in good faith, and I am not aware that this rule has been disregarded in the present examination or during the progress of this suit, for I do not know of any paper, record, memoranda, or other writing nor of any fact affecting the present issue which I have not disclosed or knowingly withheld. If there be any such it has not been known to myself nor inquired after by others.

The first time I ever heard of the David White stock as a matter of inquiry was, I think, from A. F. James, a director of the company at the time, whom I understood to represent in some way the heirs of David White, and who requested of me a statement of the David White stock and what had become of it so far as the company's record showed. I understood the inquiry to be made in behalf of the heirs of David White and to be used in their settlement with other parties, and that the Galveston City Company was not at all interested in the matter.

(Complainants' counsel object to the testimony of the witness as to what his understanding was as to the object concerning the history of the stock asked from the witness.)

Under this impression, I prepared a statement (which I think I have seen since I have been on the witness stand, already referred to as "Exhibit B") freely, cheerfully, fully, and without concealment. Some time afterwards, perhaps some years—I do not remember the date—a Mr. Moulton came into the office, professedly representing the same parties and making inquiries in regard to the same matters. My impression now is that he also disclaimed any purpose adverse to the Galveston City Company, but the order of 1858, prohibiting the inspection of the books, etc., which was what he desired, prevented my acceding to his wishes.

(Counsel for complainants interpose the same objections to the witness testifying as to his impressions formerly interposed.)

Mr. James was, at the time of his inquiry, not only a director of the company, but, I think, the largest stockholder in it; had been connected with its operations much longer than myself and was altogether more familiar with its history; was not only free to examine all its books and entries of every kind, but was one of the very few men who could pursue such an examination without any assistance from the agent.

(Upon request of defendant's counsel, the witness thereupon produced the original power of attorney from Abner S. Lipscomb to Amasa Turner, a copy of which is included in "Exhibit C;" also the certificate of acknowledgment thereon, a copy of which is also included in said "Exhibit C.")

I found this original power pasted in a file book endorsed "Powers of attorney," where it has remained ever since I have been agent, and never disturbed until this morning when I detached it to bring here. I have no doubt whatever of its genuineness from what knowledge I have of Abner S. Lipscomb's signature and the fact that I knew Moreland, the notary who certified to it, well.

(Defendant's counsel thereupon offered the said original power of attorney, with the certificate thereon, in evidence.)

81 (Complainants' counsel object to the paper offered in evidence, first, because the witness has not qualified himself to testify as to the handwriting of Lipscomb; second, because the instrument does not prove itself; third, because there has been no precedent laid to authorize evidence as to the power of Amasa Turner to transfer the stock referred to in the paper; fourth, because the power of attorney from White to Lipscomb, referred to in the bill and answer, does not give Lipscomb authority to authorize Amasa Turner to transfer the stock; fifth, because there is no evidence that the conditions under which Amasa Turner could transfer the stock referred to were ever complied with; sixth, because the matter is irrelevant to the issues joined between the parties.)

(It is agreed by counsel that the said original power of attorney be now returned to the witness, a copy thereof and of the certificate thereto being contained in said "Exhibit C" and admitted to be correct, subject to be produced on the trial.)

Testimony of JAMES P. COLE, on cross-examination, resumed:

I was well acquainted with Amasa Turner. In 1839, when I came to Galveston, he was one of the most prominent citizens; was one of the candidates for the first mayoralty of the city; owned Turner's hotel, in what was then called "Saccarap;" built Turner's wharf, in front of his hotel, and was generally one of our most active, energetic, and solvent citizens. I heard of his death not many years ago in some one of the western counties. I do not know the date or the year.

Question. State how much stock in the company stood in the name of Abner S. Lipscomb at different periods, and for how long a period, and when transfers of it were made.

Answer. I copy from the stock ledger Abner S. Lipscomb's stock account. It commenced on the fifth of May, 1841, and was closed on the twenty-second of March, 1875, several years after his death. By this account he had to his credit—

October 31, 1841, twelve shares;
July 1, 1843, six shares;
July 1, 1844, five shares;
October 10, 1845, four shares;

which he held at the time of his death. These four shares were afterwards sold and transferred by Mrs. Mary P. Lipscomb, his widow and executrix, to wit:

January 20, 1859, two shares;
April 18, 1859, one share;
March 22, 1875, one share;
which closed the account.

It is agreed by counsel that the time for taking testimony in this cause be extended until the rule day in November next.

And thereupon, by agreement of counsel, the examination
82 was adjourned until Tuesday next, the third day of October, 1882, at 10 o'clock a. m., at the same place.

Attest: C. DART,
Examiner in Equity.

TUESDAY, *October* 3, 1882—10 a. m.

Examination resumed pursuant to adjournment.

Present: Geo. E. Mann and Sam'l W. Jones and M. C. McLemore, counsel for complainants, and W. P. Ballinger, counsel for defendant.

And the witness, James P. Cole, not appearing, by agreement of counsel the examination was thereupon adjourned (having remained in session until 11 o'clock a. m.) until to-morrow, Wednesday, October 4, 1882, at 10 o'clock a. m.

Attest: C. DART,
Examiner in Equity.

WEDNESDAY, *October* 4, 1882—10 o'clock a. m.

Examination resumed pursuant to adjournment.

Present: Geo. E. Mann, M. C. McLemore, and S. W. Jones, counsel for complainants, and W. P. Ballinger, counsel for defendant, and the witness, James P. Cole; and thereupon the said witness, being duly sworn, testified as follows:

Cross-examination by defendant resumed:

Certificates numbers 33, 36, and 39, out of Book C (issued to David White), and certificates numbers 173, 174, 175, 176, and 177, out of Book E (issued to John R. Triplett), were all surrendered by Abner S. Lipscomb on the third of December, 1841, for renewal, and were merged together into one certificate, number 274, for the eight (8) shares issued to said Lipscomb of that date. This certificate, number 274, was transferred by Lipscomb to James Love on March 4, 1842, and the eight shares were again severed and new certificates issued to James Love, dated March 4, 1842, and numbered 286, 287, 288, 289, 290, 291, 292, and 293.

Number 286 went from Love to A. M. Green, February 5, 1844; from Green to John S. Sydnor, July 30, 1845, and surrendered by Sydnor and cancelled June 20, 1848.

Number 287 went from Love to John L. Darragh, January 4, 1847, and surrendered by Darragh and cancelled February 22, 1847.

Number 288 was surrendered by Love and cancelled March 10, 1845.

Number 289 was surrendered by Love and cancelled January 30, 1845.

Number 290 was surrendered by Love and cancelled July 21, 1845.

Numbers 291, 292, and 293 were surrendered by Love and cancelled April 27, 1854.

83 This is the whole history of the eight shares as taken from the books. As to which of this latter series of eight shares finally sunk and cancelled correspond with numbers 33, 36, and 39, Book C, must necessarily be a matter of conjecture.

When I speak of stock being issued to any party I mean that the name of that party appears in the body of the certificate ostensibly as the owner thereof.

Question. When you speak of stock being surrendered to the company and cancelled, state what was the course or nature of such a transaction and what consideration there was for such a surrender.

Answer. Certificates of stock of either kind (trustees' or renewed) might be and were surrendered to the company for one of two purposes—first, for renewal, in which case a new certificate issues of a different date and designation, but the stock still exists, or, secondly, for cancellation, in which case the party is credited with one thousand dollars stock for each share so surrendered, which credit he may use immediately or at any future period to pay for lots purchased by himself or by any assignee of his, but the stock itself so cancelled is considered dead, nor has any such share so cancelled ever been revived in all the history of the company, so far as I know. The theory of the transaction is that such share has received its full quota of the entire property and no longer represents any interest therein.

(Complainants' counsel object to the testimony of the witness in so far as it undertakes to state the legal effect of the operation of surrender of stock, either for renewal or cancellation, and to the statement of what is thought to be (by the witness) the theory of the cancellation or transaction, as the witness styles it.)

Cross-examination of witness in narrative form resumed:

As appears by the Exhibit C, which I have already presented, there were five shares of trustees' stock out of Book A, to wit, numbers 164, 165, 166, 167, and 168, issued in the name of Abner S. Lipscomb (and all the trustees' stock so issued, as I believe). These five shares, with eleven others that had been issued in the name of David White, were, all sixteen, surrendered and cancelled August 29, 1839, for the purchase of thirty-two lots by Abner S. Lipscomb and David White, leaving a balance to the credit of said Lipscomb and White of $1,100 stock. I ask — to present a copy taken from the journal of the company of that date as showing what particular shares of stock were surrendered and what particular lots and blocks were purchased, and as containing all the information which I possess on the subject, including the certificate of purchase which was issued for said thirty-two lots to Lipscomb and White.

(Counsel for defendant here offer and put in evidence the said paper so proven by the witness, which is returned with this testimony, marked "Exhibit D," and identified by the signature of the examiner.)

84 EXHIBIT D.

Proved by James P. Cole. C. Dart, Examiner in Equity.

GALVESTON, *August 29th*, 1839.

CANCELLED STOCK	Lots.	Bl'ck.	
To SUNDRIES			24,000 00
Sales of Lots—For 32 sold A. Lipscombe and D. White for 16 shares of stock, to wit:			PRICE.
	8	371	475
	9	"	475
Certificate Book A, No. 109	10	"	475
Do. do. 164	11	"	475
Do. do. 165	1	370	357 1-7
Do. do. 166	2	"	357 1-7
Do. do. 167	3	"	357 1-7
Do. do. 168	4	"	357 1-7
Certificate Book C, No. 1	5	"	357 1-7
Do. do. 2	6	"	357 1-7
Do. do. 3	7	"	357 1-7
Do. do. 4	8	"	357 1-7
Do. do. 5	9	"	357 1-7
Do. do. 6	10	"	357 1-7
Do. do. 8	11	"	357 1-7
Do. do. 9	12	"	357 1-7
Do. do. 26	13	"	357 1-7
Do. do. 50	14	"	357 1-7
	8	369	357 1-7
The said lots sold by the following order of the board of directors:	9	"	357 1-7
	10	"	351 1-7
Ordered, That Abner Lipscombe and David White have lots Nos. 8, 9, 10, and 11, in block 371, at four hundred and seventy-five dollars each; also the whole block of 370 for five thousand (5,000) dollars; also lots 8, 9, 10, 11, 12, 13, and 14, in block 369, at twenty-five ($2,500) hundred dollars; also lots 6, 7, 8, and 9, in block 686, for $8,000; also lots 8 and 9, in block 626, for $3,000; also lot 2, in block 680, for $2,500.	11	"	357 1-7
	12	"	357 1-7
	13	"	357 1-7
	14	"	357 1-7
	6	686	2,000
	7	"	2,000
	8	"	2,000
	9	"	2,000
	8	626	1,500
Twenty-second April, 1839.	9	"	1,500
(Signed) M. B. MENARD, *Pres. of the Board.*	2	680	2,500
LIPSCOMBE & WHITE,			22,900 00
For balance of stock due them			1,110 00

Copy certificate of purchase No. 373.

I, Gail Borden, Jr., agent for the Galveston City Company, do hereby certify that Abner Lipscombe and David White, having become the purchaser- of thirty-two lots in said city, viz., lots eight, nine, ten, and eleven (8, 9, 10, and 11), in block three hundred and seventy-one (371); lots one, two, three, four, five, six, seven, eight, nine, ten, eleven, twelve, thirteen, and fourteen (1, 2, 3, 4, 5, 6, 7, 8,

9, 10, 11, 12, 13, and 14), in block three hundred and sixty-nine (369); lots six, seven, eight, and nine (6, 7, 8, and 9), in block six hundred and eighty-six (686); lots eight and nine (8 and 9), in block six hundred and twenty-six (626), and lot two (2), in block six hundred and eighty (680), for the sum of twenty-two thousand and nine hundred dollars, and having on their part complied with the terms of sale by payment in full for said lots, are entitled to receive a conveyance for said lots, under the direction and orders of the board of directors, whenever this certificate is returned to the office of the Galveston City Company.

Witness my hand this eighth day of May, 1840.

G. BORDEN, JR.,
Agent for Galveston City Co.

Teste: ALEX'R EDGAR.

Endorsed as follows:

For value received I do hereby transfer and assign the within certificate to Dr. Levi Jones, and *the* issue title to him for the said lots.

Witness my hand this fou-th day of June, 1840.

ABNER S. LIPSCOMB,
For himself and David White.

Witness:
JOHN DINSMORE.
EDWIN LYMAN.

85 (Counsel for complainants object to the introduction of said "Exhibit D" as evidence upon the ground that it is a mere copy of original evidence in possession of the company not produced, and that part of it purports to be a copy of a transfer of a certificate of purchase of lots without any proof of signatures or any authority of Abner S. Lipscomb to make the transfer reported to have been made.)

Cross-examination of witness in narrative form resumed:

The five shares issued in the name of Abner S. Lipscomb, and which were sunk with the eleven shares issued to David White in the purchase by said Lipscomb and White of thirty-two lots, were endorsed by Abner S. Lipscomb as follows, to wit:

"David White,
per Abner S. Lipscomb,
att'y-in-fact,"

as if they had been issued to David White instead of Abner S. Lipscomb. True copies of these endorsements taken from the original certificates appear on "Exhibit C," previously presented. The endorsements on the other eleven certificates enumerated in "Exhibit D" were also transcribed from the originals, and are true copies of the same.

(Counsel for complainants renew their objections to Exhibit C.)

Cross-examination of witness in narrative form resumed :

Of all those to whom the trustees issued stock out of Books A, B, C, D, and E (except nine shares of trustees' stock, of which we know nothing)—that is to say, the original stockholders—M. B. Menard was the last to remain in the company ; he died in the year —, with five shares standing in his name and a stock credit of $1.19. The five shares were surrendered to the company and cancelled on the twenty-eighth of April, 1860, by " H. de St. Cyr, assignee of M. B. Menard," under a decree of the district court of Galveston county. I suppose Menard's connection with the company ceased with his life or with the date of his assignment to St. Cyr. . All the other original shareholders had retired from the company some years before.

Referring to my examination-in-chief as it appears on page 23, I speak " of that period," and might be misunderstood to refer to the period of the transfer of the last certificate belonging to the estate of A. S. Lipscomb on March 22, 1875, whereas an independent question intervened and I meant to refer to the period of the first opening of the transfer books on or about the eleventh of October, 1839, of which period I desire to say now that the mode of doing business of the company in the transfers of stock was exceedingly loose. By way of illustration : Of the first fifteen transfers in the transfer book, involving, in all, one hundred and seventy-five shares of stock, only three transfers have any date.

86 The order of the twenty-first of April, 1858, prohibiting the unrestricted inspection of the books, etc., of the company, had no reference whatever to David White or his heirs or any claims of theirs against the company, for I do not think that the agent or any director of that period had any knowledge or even suspicion that there were any such claims.

My impression is, being present at its passage, that the order was first induced by some unfair advantage which was sought to be taken against the company in regard to the Hardin stock ; but it was continued afterwards from the desire on the part of the directors to protect innocent purchasers of property in the city from being disturbed in their titles by speculative suits based upon irregularities in the early history of the company.

(Counsel for complainants object to so much of the answer of the witness as states impressions.)

Question by defendant's counsel, W. P. Ballinger: In your direct examination you stated the connection of W. P. Ballinger with the Galveston City Company as its attorney or counsel. I requested you to examine the records of the company and refresh your recollection on that subject. If you have done so please state the facts, fully and precisely.

Answer. Since my direct examination I have thoroughly examined the records in regard to the connection of Mr. Ballinger with the company as counsel.

Having previously been employed by other parties, M. B. Menard

and others, to defend against the City of Galveston in what is commonly known as the "Flats" case, he and his partner, Col. T. M. Jack, with Messrs. Allen & Hale, were employed by the Galveston City Company to bring suit to recover the half block of ground at the foot of Tremont street. This was on the fourth of April, 1859, and was his first employment by the company. He was subsequently employed in the "Scott" case to assist Mr. Hale, the original counsel of the company. His employment in all these cases was specific and for fixed remuneration, and in all of them in conjunction with other attorneys.

But it was not until the twenty-ninth of November, 1871, that he, with his partners, Messrs. Jack and Mott, were permanently employed as the regular counsel of the company to attend to all its law business for a fixed remuneration per annum, having no regard to the number of cases or the amount of professional labor, and he has been so employed ever since. I will add that at the time of the first regular employment of Mr. Ballinger as counsel by the company there had been long pending and were still pending several very heavy suits against the company, among others the suit of Alexander Edgar for the entire league and labor upon which the city is built, the suit of the estate of William Hardin for an indefinite number of shares of stock, and perhaps some other cases, to wit, the suit of Mrs. Mary P. Lipscomb for certain shares of City Com-
87 pany stock claimed as the property of her deceased husband, Abner S. Lipscomb; also the suit of Mrs. Groce for sundry shares of stock alleged to have been given her by Abner S. Lipscomb, and possibly other suits not now remembered. All these cases then pending were committed to the charge of the said counsel of the company, Messrs. Ballinger, Jack & Mott. In several of these cases Mr. Ballinger has had occasion to examine all the stock issued to David White, and has been pretty familiar with its history for many years. By the words "regular employment," as used in this connection, I mean "general" employment.

And thereupon, by agreement of counsel, the examination was adjourned until to-morrow, Thursday, October 5, 1882, at 10 o'clock a. m., at the same place.

Attest:

C. DART,
Examiner in Equity.

THURSDAY, *October* 5, 1882—10 a. m.

Examination resumed pursuant to adjournment.

Present: Geo. E. Mann, M. C. McLemore, —— ——, counsel for complainants, and W. P. Ballinger, counsel for defendant, and the witness, James P. Cole; and the said witness, being duly sworn, testified as follows:

(Cross-examination by defendant resumed:)

Before entering into any new matter the witness, referring to his last answer of yesterday and to the cases that were pending at the time of the permanent employment of Messrs. Ballinger, Jack &

Mott as counsel of the company, and which he did not then remember, desires now to mention the suit of the State of Texas against the company for an alleged excess of 1,700 acres in the original survey of the Menard grant; also the case of A. H. Phillips for another share of the David White issue of stock, and which went off upon the determination of the "Scott" case previously brought for a share of stock of the same issue. These shares of stock were issued by David White himself under a pretended power from M. B. Menard, and are referred to and particularly described in the answer of the defendant. The "Scott" case was decided by the supreme court of Texas adversely to the plaintiffs, and the "Phillips" case (identical in its nature) was then withdrawn. There may be yet other cases pending at the time, but they were of minor importance and not now remembered. In the "State" case, now referred to, I think Messrs. McLemore & Hume were the first counsel employed, and Messrs. Ballinger and partners and the Hon. Peter W. Gray were subsequently associated in the case.

Question. Who was employed first in the case, Ballinger, Jack & Mott or Judge Gray?

Answer. When the case was first argued before the court below Judge Gray was employed to defend on behalf of the com-
88 pany, Mr. Ballinger being then absent from the State, and he and his firm came into the case subsequently under their general employment by the company. This case also was decided by the supreme court of the State adversely to the plaintiff.

Cross-examination of witness in narrative form resumed:

Referring to my testimony in the examination-in-chief wherein I say that "Mr. W. P. Ballinger and those associated with him have been the general counsel of the company from 1861 to the present time," I desire now to state that the question was a surprise to me at the time, and suggested in it the date, and it was answered without premeditation. The entire period of the war was forgotten, and the year should have been 1871 instead of 1861. With this correction the statement is true.

Question. Who represented the company in negotiating the employment of Messrs. Ballinger, Jack & Mott as its general attorneys?

Answer. William H. Goddard, Esq., who had been himself a practicing attorney previously in this county for many years and was a member of the board of directors at the time and for many years previously and for many years afterwards, indeed until within a very recent period.

Question. At any time prior to November, 1871, were Ballinger, Jack & Mott, or any one of them, under any employment, obligation, or relations to the Galveston City Company standing in the way of their employment against the company?

Answer. Up to the time of the permanent employment of Messrs. Ballinger, Jack & Mott as counsel of the company, November twenty-ninth, 1871, there was nothing that I know of to prevent his (Mr. Ballinger) or their taking any case against the company. This was

well understood by the board of directors, and was once, in connection with some case or other, a matter of discussion among the directors at one of their meetings.

(Counsel for complainants object to the witness stating what was understood by the board and what was discussed at their meeting.)

Question. You have stated in your original examination that you had nothing to do with preparation of the answer, furnishing materials, nor were at all consulted until signed by the president and ready for filing. Please state what you meant by the above statement.

Answer. In my reply to the direct interrogatory in regard to the "answer" in this case I only meant to say that I knew nothing of it until it was read to me after the president had signed it, and had nothing whatever to do with its preparation. The material facts upon which it is based were certainly to be found in my office, and were only to be discovered with the assistance of the agent. This is all the help I rendered or was called upon to render. To illustrate, I was called upon by counsel to furnish him a statement in writing of all the White stock—twenty-four shares—sued for in this
89 case—their entire history from their first issue by the trustees, through all their transitions to their final extinguishment in the company. This statement I rendered and Mr. Ballinger has used it freely in his preparation of his answer, and it is almost the only thing that I recognize in the answer as having been specially furnished by myself. It is nevertheless true that the records of the company and the many suits in which Mr. Ballinger has been engaged in its behalf has supplied him with a great deal of material not specially called for in this suit, but which appear freely throughout the entire document.

Question. Were you acquainted with James Love and how long did you know him? And state what you know of him. What were his circumstances in 1841 and 1842, what was his character and standing, and to what extent was he a stockholder in the Galveston City Company?

Answer. I knew Col. James Love very well from the time I landed here, in 1839, up to the period of his death. He was universally considered one of the first citizens, if not the very first, of the place, having been, previously to his coming to Texas, a member of Congress from the State of Kentucky; an educated man, a prominent lawyer, and associating with prominent men, politically and professionally, he took a high position immediately upon his advent here, in which position I found him when I came. In 1841 and 1842 he was reputed to be a wealthy man, a large stockholder in the Galveston City Company, a large owner of real estate throughout the city, and generally a gentleman of easy circumstances. He was twice a judge of the State of Texas, and held other prominent political and public positions. In all my acquaintance with him and with the community in which he lived I never heard a word of suspicion breathed against his name in any respect nor ever knew that he had an enemy in the city of Galveston or elsewhere while he lived.

Question. Please state the character and reputation of Gail Borden, Jr., who was the agent of the Galveston City Company and your predecessor.

Answer. I knew Gail Borden, Jr., as long, as well, and perhaps more intimately than Col. Love; members of the same church, we were thrown more together. He was accounted by some to be somewhat eccentric, but no one doubted his integrity, his ability, or his faithfulness to any duty which he assumed, so far as I know or have ever heard. He was my predecessor as agent of the Galveston City Company, and I have been indebted to his regard for method and attention to minutiæ, his singular accuracy of detail, for the facility with which I have answered many of the questions propounded in this examination. He was well-to-do in his circumstances and thriving until his meat-biscuit enterprise, which broke him up completely. A few years afterwards he retrieved his fortunes by his condensed-milk discovery and died a wealthy man.

And thereupon, by agreement of counsel, the examination
90 was adjourned until to-morrow, Friday, October 6th, 1882, at 11.30 o'clock a. m., at the same place.

Attest: C. DART,
Examiner in Equity.

FRIDAY, *October 6th*, 1882—11.30 a. m.

Examination resumed pursuant to adjournment.

Present: Geo. E. Mann, M. C. McLemore, and S. W. Jones, counsel for complainants, and W. P. Ballinger, counsel for defendant, and the witness, James P. Cole; and thereupon the said witness, being duly sworn, testified as follows:

(Cross-examination by defendant resumed:)

At the request of defendant's counsel I produce the original entry, on page 51 of the journal, and the original certificate of purchase of thirty-two lots to Lipscomb and White, of which Exhibit D, presented heretofore, is a true copy, and offer the same to the inspection of counsel of both parties. The journal is a correct and authentic record from day to day of all the transactions of the company of every kind, except only the transfers of stock from one party to another. If stock is surrendered, transferred to the company and cancelled, it entitles the proprietor to a credit of $1,000, which, then, for the first time, appears upon the journal, and its further disposition unto extinction, sounding in dollars, must also appear upon the same journal. The book which I now produce comprises the first transaction of the company, from the twentieth of April, 1838, up to the seventeenth day of June, 1853, and has been in the office and in my possession from the first day of June, 1854, until now.

The certificate of purchase which I produce is one issued by Gail Borden, Jr., dated eighth day of May, 1840, and numbered 373, for the thirty-two lots sold to Lipscomb and White on the twenty-ninth day of August, 1839, as appears in the journal referred to. It is

one of the archives of the company, returned to it upon the issuance of a deed for property sold, and, next to certificates of stock surrendered, considered our most valuable papers, for the protection not only of the company, but of every property-holder in the city of Galveston, against fictitious and speculative suits. I recognize the signatures of Gail Borden, Jr., agent of the company, to the certificate itself and of Abner S. Lipscomb for himself and David White to the assignment of the same.

I ought to explain that the certificates of purchase of that day and for many years thereafter were assignable to other parties by the invariable custom of the company, so that it frequently happened that one party purchased the property and paid for it and a deed subsequently issued to another party, thereby necessitating for the protection of all parties in interest the preservation of these certificates of purchase. I know not to how late a period the
91 custom prevailed, but since I became agent on the first of June, 1854, I have issued only receipts for the purchase-money, and a deed invariably issues in the name of the party first purchasing. The first certificates of purchase issued were upon printed blanks, which stated that the company would issue a deed as soon as they were prepared to do so.

(The said journal and the original certificate of purchase produced by the witness are retained in possession of the witness as records of his company, the same not being offered in evidence here.)

(Complainants' counsel object to the testimony of the witness as to the contents of the journal referred to and of the certificate of purchase, because the journal and the certificate, with its endorsement, are the best evidence of the contents thereof, and because defendant's counsel decline to offer either the journal or the certificate of purchase in evidence.)

Question. Annexed as Exhibit A to your examination-in-chief is a communication dated Galveston, June 23, 1843, addressed to Dr. Clement Billingslea by G. Borden, Jr., commencing, "Dear Bro.: Your favor of twenty-fourth ult., by Mr. Barclay, was duly received." Please to state what examination you have made to find said letter from Billingslea to Borden, and the result thereof.

Answer. At the request of defendant's counsel I made a thorough examination of the papers of the office and failed to find the letter described. I found the package where it ought to be, marked "Letters previous to 1848," and it was not within that package. I also searched in other places where it possibly might be found, but without success. Again I searched for the letter on yesterday, with the assistance of defendant's counsel, and we again failed to find it. I am satisfied in my own mind that the letter alluded to (from Billingslea to Borden) is not in the City Company's office.

Cross-examination in a narrative form resumed:

When I spoke of the loose manner in which the City Company did business at the time of opening the transfer book, I illustrated by stating that of the first fifteen transfers, involving a large num-

ber of shares, only three of them had any date whatever, the actual date of each transaction being ascertained from other sources of information. The same want of method may be discovered in the first entries in the journal, which I have here present, in which appear all the sales of lots from the twentieth of April, 1838, to January 1, 1839, under one entry. The same want of method appears in many other instances, not now specially remembered. The "looseness" in the manner of doing business, to which I have referred, related entirely to the method and not at all to the correctness, good faith, and integrity of the parties. To still further illustrate: When a man brought in a share of stock issued to himself by the trustee and delivered it to the agent he was allowed to purchase its full value in lots, according to the company's prices, and receive for them
92 a certificate of purchase, without any other formality whatever in relation to the certificate of stock, that being a total blank on the reversed side, and so remaining to this day.

In answer to further question from defendant's counsel I would state that at his request I have endeavored to find out the prices at which the four shares of stock standing in the name of A. S. Lipscomb at the time of his death were finally sold. From a report of sale made to the probate court of Washington county, of which a copy is on file in my office, I discover that the first two shares sold under order of the court were bid off and sold for $1,400 and $1,410, respectively. The third share sold next at the court-house door of Galveston county brought, to the best of my recollection, over $2,000; I think $2,200. The fourth and last share was sold after an interval of several years from the one last preceding, and I have no means of ascertaining, with any precision, the amount which it brought, but to the best of my knowledge and information it was not far from $9,000, either more or less. Other shares (sold about the same period) and transferred just before and just after this one of the estate of A. S. Lipscomb brought that amount.

J. P. COLE.

And thereupon, by agreement of counsel (the cross-examination of the witness, James P. Cole, by defendant being concluded), the examination was adjourned until Monday morning next, October 9, 1882, at 10 o'clock.

Attest:

C. DART,
Examiner in Equity.

MONDAY, *October* 9, 1882—10 a. m.

Examination resumed pursuant to adjournment, and by agreement of Geo. E. Mann, of counsel for complainants, and W. P. Ballinger, of counsel for defendant, the examination was adjourned until to-morrow morning, Tuesday, Oct. 10, 1882, at 10 o'clock and 30 minutes.

Attest:

C. DART,
Examiner in Equity.

TUESDAY, *October* 10, 1882—10.30 a. m.

Examination resumed pursuant to adjournment.

Present: Geo. E. Mann, of counsel for complainants, and no counsel for defendant, and no witness appearing, the examination stands adjourned until such time as counsel may agree to resume the same or as may be otherwise ordered.

Attest:

C. DART,
Examiner in Equity.

93 TUESDAY, *October* 24, 1882—12 m.

Examination resumed this day by agreement.

Present: M. C. McLemore, S. W. Jones, and Geo. E. Mann, counsel for complainants, and W. P. Ballinger, counsel for defendant, and the witness, James P. Cole; and thereupon the re-examination of the witness by complainants was begun; and the said witness, being duly sworn, testified as follows:

(Letter from Levi Jones to Memucan Hunt, dated Galveston, twenty-second August, 1839, handed to witness by counsel for complainants and the witness asked whether or not he recognized the signature of Levi Jones to said letter, to which the witness testifies:)

I recognize the signature as the genuine signature of Levi Jones and have no doubt but that the handwriting is his, though I am not sufficiently acquainted with his handwriting to swear to it without the signature. (And thereupon the counsel for the complainants offered the said letter in evidence in this cause and the same is herewith returned, identified by the signature of the examiner, marked "Exhibit E" to testimony of James P. Cole); to the admission of which the defendant's counsel objected because the said letter from Levi Jones is not competent or admissible evidence of any fact therein stated, and the same is not under oath and is mere unsworn hearsay.

EXHIBIT E.

Proved by James P. Cole. C. Dart, Examiner in Equity.

GALVESTON, 22*nd August*, 1839.

DEAR GENERAL: I have frequently thought of writing you a line barely to say, "How do you do?" and report the domestic news of the day in Texas; but indisposition, professional and other engagements intervening, I have postponed until something of stirring interest should occur to communicate. As it appears, however, that nothing of that kind is likely to occur very soon, I determined to address you at all events, barely to say that Texas, and Galveston with it, is driving on in the usual handsome style, with little to vary the monotony of this very dull season. The Indian war in the East (in which, as I am told, by the way, that our cousin Hugh bore a full share, tho' I have not heard directly from him) seems to be brought to a close for the season. Since that matter is laid on the shelf there seems nothing to excite much of interest in the doings of

the Government. Everything seems as if pausing in breathless solicitude for some distinct annunciation of the result of the loan mission. The prospect of success, as we fear, is limited indeed; and really there is much to apprehend of general embarrassment with us, if it fails entirely in the end. The cotton crop, altho' the best this country ever saw, is too limited to effect much of sensible relief, with a currency so wretchedly depreciated as ours already is; and still, ruinous as it may be, we shall be compelled to procure supplies from abroad with it until some merciful Providence shall relieve us. Shall we have a large emigration from the U. S. next winter, and will they bring some cash and labor with them? Send all the honest fellows you can.

94

Galveston, altho' we have literally no money among us, is still going ahead rapidly in improvement, and I anticipate, about November, that we shall be able to sell city property with some spirit, tho' little can be done before that time. I sold this week two of your lots to Dr. A. Smith at an advance of thirty per centum, payment to be made 1st November. It was lower than I shall again make a sale till I hear from you about the prospect of things in the U. S., and I let him have them rather because I knew you would like to accommodate the doctor as a personal friend. I was much gratified to learn from him that you had succeeded in getting possession of your Mississippi property. Write to us and say when you will be with us, etc.

S. L. Jones, of the house of McK. & Williams, called this week on Col. Rhodes and myself to say that Ricker's acceptances wanted immediate action. Please write to us and say what must be done or what you find practicable to do.

Your servants here are all well. My wife and family desire particularly to be remembered to you. Excuse, my dear sir, the desultory style of this scrawl (as the packet is just setting out) and believe me most truly,

Your friend and relative, LEVI JONES.

Gen'l M. Hunt.

Re-examination of witness resumed:

I have the original certificate of purchase issued to Memucan Hunt for lots numbers eight and nine, in block number 499, in the city of Galveston, and the assignment thereof by said Memucan Hunt to Ashbel Smith, dated the eighth of January, 1840, the original certificate of purchase to Memucan Hunt being dated twenty-fifth day of December, 1839. This paper has been in my possession since the first day of June, 1854, but was never seen by me until withdrawn from the files on the call of complainants' counsel. One edge thereof appears to have been torn off, taking with it one-half of the surname, "Hunt," but it is in the same condition now in which I originally received it.

(And thereupon counsel for complainants offered the said paper in evidence in this cause as a whole, with the endorsements thereon,

and it is agreed by the counsel for both parties that the said original paper may be identified by the examiner by placing his initials thereon and the said paper returned to the witness and a copy to be filed by the witness with the examiner as "Exhibit F" to this testimony, the original to be produced on the hearing as evidence.)

95 EXHIBIT F

To Testimony of Jas. P. Cole. Attest: C. Dart, Examiner in Equity.

No. 242. *Certificate of Purchase in Galveston City.*

I, Gail Borden, Jr., agent for the Galveston City Company, do hereby certify that Memucan Hunt, having become the purchaser of two lots in said city, viz., numbers eight and nine (8 & 9), in block four hundred and ninety-nine (499), for the sum of fifteen hundred ($1,500) dollars and — cents, and having on his part complied with the terms of sale as prescribed by the board of directors, is entitled to receive a conveyance for said lots, under the orders of the board (with a lien upon the said lots for the payment of his notes), as soon as the company are prepared to execute deeds in proper form.

Witness my hand this twenty-fifth day of December, A. D. 1839.

G. BORDEN, JR.,
Agent for Galveston City Company.

Signed in presence of—
—— ——.

The above amount of fifteen hundred dollars paid by Dr. Levi Jones in cancelled stock.

G. BORDEN, JR.

(A true copy of original as compared by me.)

J. P. COLE,
Agent G. C. C.

For value received I hereby assign and transfer the two lots within mentioned, and request the Galveston City Company to make title therefor to Ashbel Smith.

MEMUCAN HU*

8th Jan'y, 1840.

Witness:
F. JONES.

(Counsel for complainants here handed three letters to the witness and requested him to examine the same and to say whether the letters are in the handwriting of A. F. James and signed by him; to which the witness testifies as follows:)

I have examined the three letters from A. F. James to Robert J. Ware, dated respectively April 22, May 15, and June 5, all of 1858,

* Torn off in original.

and recognize the signatures of A. F. James to each of them as genuine, but am not sufficiently familiar with the handwriting to swear to it without the signatures.

(Counsel for complainants thereupon offered the said three letters in evidence in this cause, which are herewith returned, marked respectively Exhibits G, H, and I to this testimony and identified by the signature of the examiner.) (To the introduction of which letters as evidence defendant objected, because the letters of the said James are not evidence of any fact therein stated as against defendant, and said letters are inadmissible as legal or competent evidence, and are not under oath, and are the mere unsworn hearsay of a third person.)

96 EXHIBIT G

To Testimony of James P. Cole. C. Dart, Examiner in Equity.

GALVESTON, 22*d April*, 1858.

Doctor Robert J. Ware, ex'r est. David White, Houston.

DEAR SIR: It appears that the meeting of the directors of the City Company held yesterday, and which interfered with the examination I had commenced making into the stock transactions of your testator, the late David White, and his attorney, the late Judge Lipscomb, was called to take into consideration the propriety of allowing me access to the records and papers of the company and resulted in the passage of a resolution prohibiting any further examination. I can, therefore, give you very little additional information to that already communicated. I learned, however, that the company have not the P. A. of White to Lipscomb in possession, but I have found it on record in our clerk's office and herewith hand you a copy taken this morning from the records. You will note this authority to sell, transfer, and convey, though short, is very full, and the acts of Judge Lipscomb during the lifetime of White doubtless preclude the heirs; but at his death this authority, of course, ceased, and the question as to the liability of the company to account to the heirs for the stock transfer-ed subsequent to the decease of White presents itself. I wish you to give me the precise date of White's death that I may examine what stock has been since transferred, when I will immediately notify the company of the claim of the heirs to this stock.

I also enclose you my report relating to the property sold by the company to Lipscomb and White, which shows the way in which it was acquired and the disposition made of it by Judge Lipscomb; also a memoranda of the location of the lands located by Gov. Horton.

I will investigate the condition of the remaining city property claimed by the heirs at an early day, and hope to be able to furnish you a report thereon by the time you reach Independence.

Very truly yours, A. F. JAMES.

EXHIBIT H

To Testimony of James P. Cole. C. Dart, Examiner.

GALVESTON, *May* 15, 1858.

Dr. Rob't J. Ware, Montgomery, Ala.

DEAR SIR: Since you left us I have had several conversations with some of the directors of the City Company relative to the transfer of the White stock, and yesterday in a conversation with Mr. Cole, the agent, on the same subject he informed me the directors would not rescind the order they had made prohibiting all persons from examining their books or papers, but that he thought in your case they would permit me to examine the White stock and
97 transfer, provided the heirs would agree to abide by such decision as I might make as to the validity of the transfers. I have not had leisure to see any of the directors since this conversation with Mr. Cole, but will take an early opportunity to talk with some of them again on the subject.

You will please send me the names of all the heirs of White and the names of the husbands of such of the female heirs as are married, and also their place of residence. I enclose you a letter received by yesterday's mail and redirected one by last steamer.

Yours truly, A. F. JAMES.

EXHIBIT I

To Testimony of James P. Cole. C. Dart, Examiner.

GALVESTON, *5th June*, 1858.

Dr. Rob't J. Ware, Montgomery, Ala.

DEAR SIR: I have your letter of twenty-fourth ulto., and in reply to your remarks relative to the proposition of the agent of the City Company to permit an examination of the White stock upon certain conditions I beg to say that you are laboring under a misapprehension as to the influences which induced this proposition. Mr. Cole, the agent, did not make it of his own accord or with the advice or consent of the directors, but in response to a suggestion advanced by me. What action the directors will take if the proposition is submitted to them I cannot say, but Mr. Cole has intimated his willingness to recommend it to their favorable consideration. Acting upon your suggestion to confer with Mr. Giddings on the subject, I have written that gentleman, requesting him, as the attorney of the Lipscomb estate, to join me in the proposed investigation, and if he consents I will then address a note to the company, asking that Mr. Giddings and myself may be allowed access to the stock and transfers, upon condition that the heirs of White and the representatives of Lipscomb shall be bound by our decision as to the validity of the transfers. I hope to receive an answer from Mr. Giddings in a day or two.

I have been trying to compromise with the adverse claimants of

the city lots and believe I shall succeed in inducing the man in possession of three of them to execute a lease acknowledging our ownership by giving him the use of the ground for twelve months and allowing him at the expiration of that time to remove his improvements. The claimant under tax title of the seven lots I fear we shall have to sue, and, if so, I would prefer bringing the suit in our State court, as we can place greater dependence in attaining a speedy trial there than in the Federal court. The other lots I think I shall get released without any serious difficulty. I have not been able to get a statement of the lot transaction from Dr. Jones, although I have addressed him a note requesting it. He is to meet me this
98 evening, and I shall then know whether he will give it or not. Nor have I any answer to my letter addressed to Col. Love, which left here the day you left.

I have heard nothing from Judge Horton, of Brenham. Should we be compelled to proceed against the City Company in the stock matter, will endeavor to get the representatives of Lipscomb to agree to pay the costs if found that the stock had been transferred by Lipscomb. I have written to Liberty county to have the records examined, to ascertain what lands, if any, stand in the name of Billingslea or in the names of yourself and White. I thought it best to try to obtain such information as a preparatory step to seeking information through Mr. Abbott. I expect to hear from Liberty by Monday and will then write Mr. Abbott.

I presume that in the course of the next week or ten days I shall be fully posted in regard to the several points referred to and advise you in full in my next.

I remain very truly yours, A. F. JAMES.

Re-examination of witness resumed:

Question. The following language (I read from the letter of April twenty-second, 1858, being Exhibit G referred to), "it appears that the meeting of the directors of the City Company, held yesterday, and which interfered with the examination I had commenced making into the stock transactions of your testator (meaning David White, dec'd) was called to take into consideration the propriety of allowing me (meaning A. F. James) access to the records and papers of the company and resulted in the passage of a resolution prohibiting any further examination." Will you state whether the matter recited in the foregoing quotation is correct, or do you know?

Answer. The impression upon my mind is distinct and well defined, and has been so for many years, that the prohibitory order alluded to had its first origin and inducement from the examination of the books, &c., in behalf of the heirs of William Hardin, deceased. The passage of the order may have been hastened by the pending examination of A. F. James, which fact, while I do not remember it after so many years, I will not venture to contradict or question.

Mr. James had already ceased to be a director for more than three years previous to the passage of the order, having retired from the board on the twenty-fourth of February, 1855.

Question. In the letter of May fifteenth, 1858, being Exhibit H, referred to, I note the following language: "Since you left us I have had several conversations with some of the directors of the City Company relative to the transfer of the White stock, and yesterday, in a conversation with Mr. Cole, the agent, on the same subject, he informed me the directors would not rescind the order they had made prohibiting all persons from examining their books or papers, but that he thought in your case (meaning that of Rob't J.
99 Ware, executor of David White, deceased) they would permit me (meaning A. F. James) to examine the White stock and transfers provided the heirs would agree to abide by such decision as I might make as to the validity of the transfers." Do you recollect the fact of a conversation such as that referred to in the quotation made, and is the statement of A. F. James correct as to what he represents was the conversation with you?

Answer. I do not at all recollect the conversation alluded to, and yet have no doubt whatever of its occurrence as detailed by Mr. James. It was characteristic of me to make such a proposition, and, being familiar then with all the David White stock and its assignments and transfers, I considered the proffer to submit the matter to any disinterested party a safe one for the company to make, an opinion which I entertain to-day.

Question. In the letter of the fifth of June, 1858, being Exhibit I, referred to, I note the following language: "I have your letter of the twenty-fourth ultimo (meaning the letter of Rob't J. Ware, executor of David White, deceased), and in reply to your remarks relative to the proposition of the agent of the City Company to permit an examination of the White stock upon certain conditions I beg to say that you are laboring under a misapprehension as to the influences which induced this proposition. Mr. Cole, the agent, did not make it of his own accord or with the advice or consent of the directors, but in response to a suggestion advanced by me. What action the directors will take if the proposition is submitted to them I cannot say, but Mr. Cole had intimated his willingness to recommend it to their favorable consideration." Do you recollect anything at all about the matters spoken of in the above quotation, and do you recollect whether such a proposition as that referred to was ever submitted to or acted upon by the directory of the Galveston City Company?

Answer. I have no recollection now of the conversation or facts alluded to, or, at most, a very vague and faint impression of them. That they did occur, nevertheless. I have no doubt, but I am very confident that the matter never was submitted to the board of directors nor acted upon by them, nor was the proposition reduced to writing, so far as I remember. Mr. James represents me truly as being not unfriendly to such an arrangement.

The tabular statement of the David White stock was made at Mr. James' request while he was yet director of the company and must have been between the first day of June, 1854, and the twenty-fourth of February, 1855, and, therefore, long anterior to the writing of these letters to Rob't J. Ware. Having that tabular state-

ment now before me, I see it endorsed "Historical history of Galveston City stock, originally issued to David White, taken from books of G. C. C., August the twenty-first, 1854," which endorsement was not made by me, but I presume by Mr. A. F. James, upon receipt of the document.

Question. Have you made such examination of the papers in the office of the Galveston City Company as to enable you to say
100 that there is not amongst the papers in the office a written application to the secretary or directory or agent, made in 1858 or thereafter, by A. F. James or any other person for permission to examine the White stock and transfers and books and papers connected therewith?

Answer. I have made such examination thoroughly and more than once, and the result of such examination was this conviction: No such application in writing from Mr. James ever reached the board of directors. An application for that purpose—I think in writing—from Mr. Coryell was brought into the office and, I think, carried out again by Mr. Coryell, he being assured by the agent that it was hopeless to present it to the board of directors. Another application for the same purpose at another period was presented to me by Mr. Moulton and shared the same fate. I do not think that I read either of said applications, nor do I know what became of them. Another application in writing at another time was made by Messrs. Mann & Baker, but it was for a different purpose; was submitted to the board of directors and was acted upon by them. There may have been other applications, but I do not now remember them. I will explain: An application brought into the office for any purpose and not deemed of sufficient importance to go before the board of directors is either returned to the applicant or otherwise disregarded; no note whatever is taken of it nor any care to preserve it. If it goes before the directors and is acted upon by them, it has then a status among the records and is preserved in its proper place among the minutes.

Question. Have you preserved any letters or communications addressed to the Galveston City Company, its directory or agent, other than those which have from time to time been submitted to and acted on by the directory?

Answer. Not a single one that I know of. I could only preserve such as the agent of and in trust for foreign parties, which I have never considered a part of my duty. By foreign parties I mean persons having separate and independent interest from those of the City Company, whether adverse or not.

And thereupon, the re-examination of the witness, James P. Cole, not being concluded, the examination was adjourned, by agreement of counsel, until to-morrow, Oct. 25, 1882, at 12 o'clock m., at the same place.

Attest:

C. DART,
Examiner in Equity.

WEDNESDAY, *October* 25, 1882—12 m.

Examination resumed, pursuant to adjournment.

Present: Geo. E. Mann, M. C. McLemore, ——, counsel for complainants, and W. P. Ballinger, counsel for defendant, and the witness, James P. Cole.

101 (It is admitted by the counsel that — the suit of Hardin against the Galveston City Company, referred to in the evidence, the petition is marked filed August 25, 1856, citation and copy of petition issued to defendant December 19, 1856, and answer filed January 2, 1857.)

And thereupon the re-examination of the witness, JAMES P. COLE, was resumed by complainants, and the said witness, being duly sworn, testified as follows:

Question. What has become of letters or other communications to the company since 1854 other than those stated by you to be filed with the minutes?

Answer. I don't know.

In response to further questions the witness says:

Since the first day of June, 1854, I have done all the clerical work of the office of the City Company and performed all the other duties devolving upon the agent of said company without any assistance so far as I now remember.

Question. Are there any duties performed in the office of the City Company for the company other than those devolving upon the secretary and agent?

Answer. There are certain menial duties, such as sweeping out the office building, making up the fires in winter, and bringing water occasionally, which I have usually employed a colored man to perform. The papers to which I have previously alluded as not being deemed of sufficient importance by me to take care of and which I have just said that I knew not what became of them may by possibility have fallen upon the floor and been used by him to kindle his fire with.

Question. Has your occupation since 1854 been exclusively that of agent and secretary of the Galveston City Company?

Answer. No; not exclusively. During that period I have been commissioner of the county two years, chief justice of the county and probate judge four or six years; also recorder of the city for two or four years. I have also been connected with various organizations of the city as a director; and all these have called me out of the office of the company during business hours for a short time during the periods alluded to. My office hours have been exceedingly irregular as to the particular time of day and as to the length of period per day, according to the business of the company and the length of time required to perform it.

Question. How many hours per working day have you kept open the office of the City Company for the last five years?

Answer. It is utterly impossible to say or even approximate.

Question. Do you generally spend as much as five hours per working day in the office of the City Company?

Answer. My hours professedly used to be from 10 a. m. to 2 p. m., and at a later period from 11 a. m. to 3 p. m.; but I have not at all considered these hours imperative upon me, and have regulated the period of my stay in the office according to the work to be performed, varying from one hour to seven or eight hours per day.

102 Question. What is and has been since 1854 the salary of the agent and secretary of the Galveston City Company?

Answer. My salary began in 1854 at $1,000; was increased soon after (I do not remember the date) to $1,200, and subsequently to $1,800, and to $3,000. When business became dull and the duties of the agent did not justify so large a compensation he himself, of his own motion, reduced the salary to $2,000 and afterwards to $1,500. When business revived the agent, under a discretion allowed him by the board, raised the amount to $2,000, at which figure it now stands.

In answer to further question the witness says:

At the request of counsel for complainants I have spent some time in looking up Abner S. Lipscomb's signatures; but they are so scattered among the books—the transfer book, the books of stock certificates, the stock stump books, and other papers of the office, receipts, orders, etc.—that I cannot hope that I have found them all and found it impossible to enumerate them. I will only add that it is impossible to produce them here without bringing books and papers that it would be unsafe to permit to leave the office.

Question. When you speak of "orders" what do you mean by it?

Answer. An "order" may be for a certain amount of stock credit standing in the name of the drawer and sold to and to be used by the payee in the purchase of property from the company, of which I have one specimen here present, signed by Abner S. Lipscomb; or it may have been in early times the assignment of a certificate of purchase and an order to the agent to issue the deed in the name of the assignee, of which I presented a specimen on yesterday, signed by Memucan Hunt in favor of Ashbel Smith. The order first alluded to above reads as follows, to wit:

"Galveston City, first July, 1840.—Mr. Gail Borden, agent for the Galveston Company: You are hereby authorized to give John S. Sydnor the credit of eleven hundred dollars on the books of the company that now stands to the credit of D. White and myself.

"(Signed) ABNER S. LIPSCOMB,
"For Self and D. White."

and on the left hand: "Witness, Tod Robinson, W. B. P. Gaines." Written across the face appears the following: "Accepted first of July, 1840, and ch'd G. Borden, Jr., agent." Endorsed in Mr. Borden's handwriting: "No. 11. Lipscomb and White's order favor John S. Sydnor for balance stock due them, $1,100. Accepted first July, '40;" and apparently in another handwriting underneath, "First July, 1840, journal, page 87."

(It is agreed by counsel that the original of the foregoing shall be produced for the inspection of the court on the hearing, the same being retained by the witness in his possession.)

Question. Where did you find this order?

Answer. I found it in a file or package of which it was number 11 from the beginning of the files, and was led to it by that number appearing upon the original entry in the journal, page 87.

103 Question. How many orders are preserved by the City Company, how are they preserved, and what book refers to them by their respective numbers?

Answer. When an order is presented to the agent, signed by a party having a stock credit in favor of another party, it is entered upon the day book first and then the journal in favor of the one and against the other party, in which entry appears the number of the order next following the last entry of the same character. The order and all others of such a kind are then filed away in parcels of 100 each, and five of these parcels are tied together, and the whole five hundred are put away and preserved for reference only. The number to these orders has now reached to several hundred more than 1,500. I cannot tell without referring to the book. The bundle or package from which this order was taken I do not think has been opened before for twenty-eight years, or since I have been agent.

And thereupon, the re-examination of the witness, James P. Cole, not being concluded, the examination was adjourned, by agreement, until such time as counsel may agree to resume the same or as may be otherwise ordered.

Attest:

C. DART,
Examiner in Equity.

SATURDAY, *December 9th*, 1882—10 a. m.

Examination resumed by agreement.

Present: Geo. E. Mann, counsel for complainants, and W. P. Ballinger, counsel for defendant, and the witness, James P. Cole.

And thereupon the re-examination of the witness by complainant- was resumed, and the said witness, being duly sworn, testified as follows:

Question. Please explain how it is that ledger account of Lipscomb only shows twenty shares to have been owned by him, and yet your testimony is that he owned twenty-five.

Answer. The apparent discrepency is easily explained. The twenty shares exhibited in the ledger are renewed stock, which properly belonged there, and the other five shares are trustees' certificates, which have no place either in the stock ledger or in the transfer book.

Question. In connection with the suits against the Galveston City Company in behalf of the estate of Abner S. Lipscomb for thirty shares of stock, have you not seen a receipt signed by James Love to Abner S. Lipscomb, bearing date March fourth, 1842, and stating

in substance that he had received sixteen shares of Galveston City Company stock from said Lipscomb to be returned when called for?

Answer. I was a witness in a case brought, as I now think, by Mrs. Mary P. Lipscomb, the widow of A. S. Lipscomb, deceased, and perhaps as executrix of his estate, and was present at the trial. Some such paper as that described in the interrogatory was produced upon the trial and read, I think, but I have no recollection of its date or the number of shares involved, nor of any other feature, except this, that it was for sundry shares of stock loaned by A. S. Lipscomb to James Love and to be returned in kind by said Love. I have never seen the paper nor read it, so far as I now recollect, and the above is the only impression I have of its contents. I do not remember that I have ever seen a copy of it nor that I have ever had any correspondence with the representatives of that estate on the subject of their claim, though this latter might be possible and passed from my recollection.

104

Question. Do you know what became of that receipt or the court papers in that suit?

Answer. I have no idea whatever.

Question. Was not Judge James Love a man of splendid and striking personal figure and appearance, courtly and elegant in manners and address, of big heart and brain, and great personal magnetism that endeared him to his friends in a remarkable way, and was he not a Kentuckian of the "old school," who delighted in a game of cards with heavy stakes, and did he not speculate largely with his own means and his friends; and on the fourth of March, 1842, or about that time, was not his fortune and means such that sixteen shares of Galveston City stock were a small matter to him, and was not Abner S. Lipscomb a warm, personal friend of Judge Love, and did not Judge Love soon thereafter meet with heavy pecuniary reverses and losses that kept him a poor man for the rest of his life? Is not all that is stated in this question true in a general way?

Answer. What I knew of Col. James Love, of my own personal knowledge, has been already sufficiently expressed in my answer to one of the cross-interrogatories, and I refer to that answer without repeating any part of it in reply to this question. That he was courtly in manners, prominent in station, endeared to his friends, and respected by all who knew him, is true. That he was in affluent circumstances and free and generous in his benefactions was the universal impression in the community. That he was afterwards unfortunate and met the fate of others of equal prominence in that day—of Samuel M. Williams, of Thomas F. McKinney, of Michel B. Menard, and of Robert and David G. Mills, and of Levi Jones, and of many others—to be wealthy in life and to die poor, leaving to others to reap the advantages of their sacrifices, is equally true. I never saw him play a card nor ever knew of any speculation which he made. To no one of these parties named would have been the loss of sixteen shares of stock (worth from $125 to $175 a share)—have been an object of any great concern.

Question. During the progress of this examination and while in

the office of the company, in the presence of W. P. Ballinger, J. R. Coryell, and Geo. E. Mann, did you not state that you believed that James Love borrowed the sixteen shares trustees' certificates *of* which he surrendered on the fourth of March, 1842, for renewal from Abner S. Lipscomb, and was afterwards unable to return them?

105 (This question objected to by defendant's counsel because the belief of the witness on the subject inquired of is not competent evidence.)

Answer. I knew nothing whatever of the transaction alluded to except as developed by the paper called "a receipt." I think that in the conversation in the office I must have been misunderstood; that if so many shares had been borrowed, as appeared, from A. S. Lipscomb by James Love, they must have been borrowed to use, in which case they could not possibly have been returned. In this aspect Col. Love may be said to be unable to return the stock.

And thereupon, by agreement of counsel, the examination was adjourned until to-morrow, Tuesday, the twelfth day of December, 1882, at 10.30 o'clock a. m., at the same place.

Attest: C. DART,
Examiner in Equity.

TUESDAY, *December* 12, 1882—10.30 a. m.

Examination resumed pursuant to adjournment, and by agreement of parties and upon request of counsel for defendant the examination was thereupon adjourned until such time as counsel may agree to resume the same or as may be otherwise ordered.

Attest: C. DART,
Examiner in Equity.

MONDAY, *March* 12, 1883—10 a. m.

Examination resumed by agreement.

Present: M. C. McLemore, Geo. E. Mann, counsel for complainants, and W. P. Ballinger, counsel for defendant, and the witness, James P. Cole; and thereupon the said witness, being duly sworn, testified as follows:

And thereupon the re-examination of the said witness was resumed by counsel for complainants:

1st question. Have you produced the books and papers as requested?

Answer. I was summoned on Saturday to appear here this morning and to bring with me the following list of books and papers:

1st. Power of attorney from Asbel Smith to James for transfer of shares.

2d. Journal of company from 1838 to 1853, produced on former occasion of this your examination.

3d. Book from which was taken power of attorney from Lipscomb to Turner and index thereto.

4th. Stock register of the company.

5th. Certificate number 274 of renewals and company transfer book showing Lipscomb's transfer of the shares of stock mentioned therein.

106 6th. Every signature of Abner S. Lipscomb and papers or books containing same.

I have brought with me all of the foregoing list, and am ready to produce the same as they may be called for, except the last, numbered 6th. To find every signature of Judge Abner S. Lipscomb now in the office of the company, and to be sure of having done so, would necessitate the examination of every paper and every book and every page of the books of a heavy land business covering a period of forty-five years, or at least to the death of Judge Lipscomb. This would require the incessant labor of one man for, perhaps, years. I would not undertake to do it within a less period. The demand is simply preposterous, and I can only interpret it as a specious device to call for something that cannot be produced as a pretext for the complaint that something has been withheld and concealed which ought to have been disclosed.

2d question. The power of attorney from Ashbel Smith to James for transfer of shares you will please produce.

Answer. (The witness here produced the power called for), which is in the following words:

"58.

"STATE OF TEXAS, } ss:
" *County of Harris,* }

"Know all men by these presents that I, Ashbel Smith, of said county, have constituted and appointed A. F. James, of the county of Galveston, my attorney, to transfer on the books of the Galveston City Company three shares of stock, numbers 471, 472, and 473, and I hereby ratify and acknowledge said transfer as mine, as though done by me in person.

"Given under my hand and scroll for seal this fifteenth day of May, 1847.

ASHBEL SMITH. [SEAL.]"

"Witness:
"JOHN H. WALTON."

(It is agreed by counsel that the original of the foregoing be produced by defendant on the hearing, the said original now being placed in the custody of the witness.)

3d question. Is that the only power of attorney from Smith to James now in possession of the company?

Answer. The only one that I know of.

4th question. Were the shares of stock that are referred to in the power of attorney transferred through the office of the company, under the power of attorney introduced?

Answer. Yes, sir; on the ninth of June, 1847.

5th question. The power of attorney seems to be embraced with a number of papers in book form. Will you state who placed the

power of attorney in the compilation with which it is connected in this book?

Answer. I found the said power in the book and in the place where it now is when I took charge of the office in June, 1854. The book is called "Powers of Attorney," and the powers are numbered from one onward, in figures, which are not Gail
107 Borden's and which I do not recognize. There is an index in the back of the book, which is in the handwriting of Gail Borden, Jr., the agent of the company before my term of office commenced. It is from his possession that I received the book alluded to, and it has been in my possession ever since, and I have continued to file powers of attorney in the same book that have occurred within my agency.

6th question. Is there any power of attorney in that book from Lipscomb to any one? If so, how many, and to whom, and for what?

Answer. The only power of attorney from Abner S. Lipscomb which I have been able to find upon a cursory examination is the one to Amasa Turner, already exhibited in one of my previous examinations. Possibly there may be others occurring within my own term, in the nature of proxies authorizing the representation of his four shares of stock at meetings and elections of the company.

7th question. Does that book contain anything other than powers of attorney?

Answer. Only a few proxies to represent stock in the meetings of the company.

8th question. Are all the powers of attorney now known to be in possession of the company contained in that book?

Answer. Up to a very late period they are or ought to be. Since the beginning of the troubles which the City Company, defendant in this case, has had from time to time in regard to certificates of stock, their transfer and their ownership, I have adopted another rule, and now file powers of attorney to transfer with the certificates of stock themselves.

9th question. Has the company any power of attorney from White to Lipscomb at all?

Answer. Not in the book now produced and not that I can now remember, but I cannot speak positively on this point. The power of attorney which is on record, as I have heard, in Galveston county, I do not remember ever to have seen in the office of the company or elsewhere.

10th question. Is there a power of attorney in that book from Lipscomb to Love?

Answer. Not that I have been able to find.

11th question. Nor from Love to Lipscomb?

Answer. I have found none from Love to Lipscomb.

12th question. Will you produce the journal of the company from 1838 to 1853?

Answer. I here produce the book referred to, exhibited once before.

13th question. What does the book purport to contain in general?

Answer. A daily record of the transactions of the company in the matter of sales of lots from the first sale, twentieth of April, 1838, to seventeenth of June, 1853; also all matters of cancelling of stock, whereby certificates of stock were merged into (stock) dollars and cents. In short, all matters sounding in dollars, pertaining to individuals, whether stockholders or not.

108 14th question. When did Memucan Hunt acquire the right to take title to himself or his assigns or his order lots eight and nine, in block four hundred and ninety-nine, in the city of Galveston?

Answer. I find in the journal an entry of September 28, 1638, occupying all of page 5, a list of lots sold to Memucan Hunt, amounting in the aggregate to $26,530 stock, and including lots numbers eight and nine, in block number 499, for $1,500 of the above aggregate. These lots were purchased on a credit and bills receivable were charged with the amount. If the purchaser desired, he received a certificate of purchase, with a lien reserved for the purchase-money, which either he himself or any assignee of his, either proximate or remote, could pay and demand a deed from the company.

15th question. Please produce the stock register of the company and state what it contains.

Answer. I here produce the said book, marked on the back "Agents' Reports and Stock Register," "Galveston City Company." It contains registration of the original thousand shares trustees' certificates, to whom originally issued, and date of issue by the trustees; to whom afterwards renewed and when, and the number of the renewed certificate. Besides this the book contains copies of the earlier annual reports of the agent of the company, but more than one-half of the book is entirely vacant.

16th question. Does this book show to whom all of the original stock was issued?

Answer. It professes to do so and I have never yet discovered in the subsequent history of the company any mistake in its record. Perhaps I should add by way of precaution the fact that out of Book E there were eight shares never issued by the trustees for want of blanks, and for these eight shares the company afterwards issued renewed stock to parties claiming and entitled to them without any corresponding trustees' certificate.

17th question. Does the book show whether it has all been renewed or not?

Answer. It ought to do so, and I think it does.

18th question. How many of the original shares have been renewed or sunk or otherwise changed from their original condition?

Answer. I think there are ten certificates of trustees' stock that have never been brought into the company's office for renewal, but of these ten the company bought one from the parties entitled to the duplicate, which it preferred to issuing any duplicate. There are still outstanding nine of these certificates of which we know not where they are nor to whom they belong, as they are transferable by assignment on the back. Of the original trustees' stock some were

brought in for renewal and renewed certificates issued either to the original parties or to their assignees. Many of them were surrendered in the purchase of lots, either by assignment to the company or in some cases entirely in blank. The stock at an early day was worth less than $200 per share and parties dealing in them were
109 very careless of the form of transfer, a simple delivery being deemed sufficient for the purpose. All of the original shares, except nine, have been renewed or sunk or otherwise changed from their original condition.

19th question. State to whom these nine that have not been surrendered were originally issued.

Answer. I do not know without a further examination of the records.

20th question. You have stated that the book which is presently before us shows all the trustees' stock surrendered in any way and that not surrendered. Can you not tell from an examination of the book to whom the nine shares not surrendered were originally issued?

Answer. Not perceiving the relevancy of this question, I decline to answer it.

And thereupon counsel for complainants demanded of the examiner that he propound the last preceding question again to the witness and to demand of the witness that he answer the question; and thereupon the examiner again propounded the question to the witness and he replied thereto as follows: I suppose that I could.

21st question. Have you not heretofore examined the book and have you not heretofore ascertained the names of the persons to whom the nine missing trustees' stock were issued?

Answer. For answer to this question I refer to a part of my previous answers as conclusive on this point. I have had occasion to examine the records on this point more than once and ascertained at the time, but cannot bear in memory either the names or dates or numbers of the nine certificates alluded to.

And thereupon the counsel for the complainants here state that they offer in evidence the said "stock register" for the purpose of showing the contents thereof, from which will be disclosed the names to whom the original trustees' stock was issued the number of original trustees' shares that have been surrendered or renewed and the number of those not surrendered or renewed, and the names to whom the same were issued, to wit, the names to whom the nine missing certificates were issued, being the same referred to in the answers of the witness, and also to show the reports of the agent contained in said book having reference to the transactions of the company concerning the issuance, sale, and transfer of stock.

To which the counsel of the defendant objected that said book was brought before the examiner in order that the witness might refer to any part thereof to which he might be interrogated having any relevancy to this case whatever, which the witness is now ready to do, but the said book did not leave the custody of the witness and

has not been otherwise before the examiner, and the complainants have no right to the said book or to make the same evidence, but only to examine the witness as to matters which may be contained
110 therein relevant to this suit, and the said book is the private property of the defendant corporation and contain- records and transactions of its private business for many years wholly irrelevant to this suit, and no authority or power exists to require the same to be made evidence or submitted to the inspection of complainants' counsel, but the same would be wholly inadmissible and illegal; that the plaintiffs' bill alleges the entire number of shares of stock which issued to David White and the particular shares which are subject of controversy in this suit, and it is therefore impossible that the plaintiffs can have concern or interest in the said nine other shares of trustees' stock, and the only effect of the statement of the names of the persons to whom issued might be to open the door to speculative litigation against the company wholly distinct from the present litigation, and that the witness has no power or authority over said books so to expose the business of the company, nor should the court compel such exposure in this case; that said agent's reports relate to the general business of the company, and are not in any manner pertinent or relevant or shown to be so to this case, and disclosure thereof ought not to be compelled; and thereupon the said witness declined and refused to put the said book in evidence or to permit the same to go in evidence in this case or to submit the same to the general inspection and perusal of complainants' counsel.

22d question. Have counsel for complainants ever been permitted at any time to examine the contents of the book referred to in the objection made by defendant's counsel, so as to ascertain what is contained in the book?

Answer. When the counsel for both parties on one occasion, and the counsel for the complainants on another occasion, perhaps two other occasions, met together in the office of the company, there was not a book or paper or record withheld from their inspection that was called for by any one of them or that was deemed pertinent to any issue in the present suit. The books, as brought out from the safe and a wooden box, were displayed on a table in the office, and the counsel for the complainants were not only permitted to inspect them freely, but were assisted by the agent in finding anything which they desired to see. In referring to the papers above I mean to include all the original certificates ever issued to David White, and all transfers and other memoranda connected therewith.

23d question. Will the witness allow counsel for complainants now to examine the contents of that book?

Answer. The book relates to private affairs of, perhaps, thousands of persons, who have dealt with the company from time to time, and the witness has no right to expose their private affairs to the inspection of other parties, and therefore declines to permit the examination referred to.

24th question. Please produce certificate number 274, renewed stock.

Answer. I here produce the certificate called for and the transfer book in connection therewith.

111 (Counsel for complainants here offer in evidence certificate number 274, renewed stock, and the transfer book showing the transfer thereof, and it is agreed that the witness may return the same in his possession, subject to be produced on the trial.)

And thereupon the re-examination of the witness, James P. Cole, by complainants not being concluded, his further examination was postponed until to-morrow morning, at 10 o'clock, by agreement of parties, at the same place.

Attest:

C. DART,
Examiner in Equity.

GALVESTON, TEXAS,
FRIDAY, *December* 6, 1883—10 a. m.

Examination resumed by agreement of counsel.

Present: Geo. E. Mann, M. C. McLemore, counsel for complainants, and W. P. Ballinger, counsel for defendant.

The counsel in this cause filed an agreement, signed by them, for the admission of documentary evidence to be used in this suit, which is returned herewith, marked or endorsed "Agreement as to evidence," and identified by the signature of the examiner as introduced this date, together with the exhibits referred to therein.

And thereupon, by agreement of said counsel, the examination was adjourned until to-morrow morning, at 10 o'clock a. m., at the same place.

Attest:

C. DART,
Examiner in Equity.

SATURDAY, *July* 7, 1883—10 a. m.

Examination resumed pursuant to adjournment.

Present: Geo. E. Mann, S. W. Jones, and M. C. McLemore, counsel for complainants, and W. P. Ballinger, counsel for defendant, and the witness, James P. Cole.

And the said witness having been duly sworn, thereupon the re-examination of the said witness was resumed by complainants' counsel, and the said witness, upon such re-examination, testified as follows:

Question. We desire to know from you what the books of your company show as to transactions by Ashbel Smith in shares of Galveston City Company stock, and also to be advised by you what is shown on the same subject, through an examination of the original certificates of stock that have been surrendered or for any reason are now in the possession of the company, such information to be gathered from entries in your books and endorsements on the original certificates.

112 Answer. The stock ledger, stock register, and transfer book, which are all the books pertaining to stock belonging to the company or ever in use by it, except the certificates themselves and their stubs, all combine to show that on March 5, 1845, M. B. Menard transferred to Ashbel Smith one share of stock, number 470, and on the same day Ashbel Smith surrendered three shares of trustees' stock, numbers 10, 12, and 28, Book C, originally issued to David White, and he received for them renewed stock, numbers 471, 472, and 473.

These shares were disposed of by him as follows:

On June 9, 1847, he transferred to J. M. Jones the three shares numbers 471, 472, and 473 previously renewed to him, and on September 26, 1850, he transferred to Gail Borden, Jr., the remaining share, number 470, previously derived from Menard. These four shares, numbers 470, 471, 472, and 473, are all the renewed stock that ever stood in his name or passed through his hands. This is absolutely certain, both affirmatively and negatively, so far as renewed stock is concerned, if the books are to be trusted.

Of trustees' stock any number of certificates might have passed through his hands in trade or otherwise with the simple endorsement of the original holder either with or without his own name appearing upon them, and these (unless endorsed by him) it would be as impossible to identify as to trace a bank bill from its first issue by the bank to its final return through the various hands into which it may have passed intermediately. I have not — all attempted this latter investigation.

Question. Will you state how many shares of the stock of your company are now outstanding undisposed of, as shown by the books of the company?

Answer. From the best of my knowledge and belief, there are today outstanding thirty-five (35) whole shares of stock, besides stock credit on the books or fractions of shares standing in different names to the amount of between two and three shares more. These thirty-five (35) shares include nine shares of trustees' stock which have never been returned.

Question. You state that these thirty-five shares include nine of trustees' stock which have never been returned. Will you now state to whom any of these nine trustees' stock belonged, so far as the records of the company furnish the information or as may be known to you from any other source?

(Thereupon the counsel for the defendant stated to the witness that he had been asked the question before and the answer was declined, and the said counsel now advised the witness to continue to decline to answer the question unless it was shown that the complainants had some interest in some of said nine shares of stock.)

Answer. Having once declined to answer this question before, I will only add now that it is impossible to do so without special reference to the archives of the company. The only thing I am sure of and can speak confidently to is that neither David White in
113 his lifetime nor his heirs nor any one claiming under him

have any interest in any one of those missing nine shares, so far as the books show or my knowledge extends.

Question. You have stated that you know, through information acquired from an examination of the books of the company, that neither David White in his lifetime nor any one claiming under him since his death have any interest in the nine shares trustees' stock not returned, and you have declined heretofore to exhibit the books of the company so as to enable complainants' counsel to make an examination of said books for the purpose of satisfying themselves by personal examination of the same. After having stated your conclusions from your own examination, do you now decline to allow complainants' counsel the privilege of an examination of the books to see for themselves what evidence the books afford as to the interest of the complainants in this case, in showing to whom the nine shares of trustees' stock not returned belong?

Answer. I have no further answer to give than I have already given, except to say that I do not remember having ever refused to exhibit a single book, paper, record, or writing whatsoever pertaining to these complainants or their claims as set forth in their bill of complaint; but as to the nine missing shares of trustees' stock belonging, so far as I know, to other parties, I do not feel at liberty to expose the rights of these parties to other persons who would thus acquire the opportunity, whether disposed to use it or not, of speculating upon their own discoveries and the ignorance of those who are the real parties in interest and whose rights we are bound to protect.

Question. Is it not true that the owners of the nine shares not returned are entitled to large amounts of money and other credits due to them from the company and to which they have asserted no claim within the past twenty years, and that the company has not been able through any effort used by them to communicate to the owners of said nine shares of trustees' stock a knowledge of their rights, and that, in fact, no such communication has been made by the company?

Answer. This question is so complicated and so made up of law and of fact that I do not feel competent to reply to it.

And here the complainants' counsel closed their re-examination of the witness.

And, the examination being ended, the witness proceeded to say:

In concluding my testimony in this case I desire to make one qualifying remark that applies to the most of it. The transactions upon which this suit is based occurred a great many years ago and many years before I was connected with the Galveston City Company—some of them before I came to Texas. I know nothing of them of my own knowledge, and have only testified to them as developed in the books, papers, records, and files of the Galveston City Company now in my possession. There are many
114 things—the minutiæ of transactions—that at the time of their occurrence could easily be explained or required no expla-

nation which now, after the lapse of nearly half a century and the death of all the parties to them, might be wholly inexplicable. Many things transpire daily in the office now that fifty years hence, after the change of parties and methods of business, might be of such a character.

J. P. COLE.

And thereupon, the examination of the witness, James P. Cole, being concluded and no other witnesses being produced by either party, by agreement of said counsel the examination was thereupon adjourned until such time as the parties may agree to resume the same or as may be otherwise ordered.

Attest:

C. DART,
Examiner in Equity.

SATURDAY, *July* 8, 1882—11 a. m.

Examination resumed pursuant to adjournment.

Present: Geo. E. Mann, counsel for complainants, and W. P. Ballinger, counsel for defendant.

JOHN L. DARRAGH, a witness introduced by complainants, being duly sworn, testified as follows:

I am president of the Galveston City Company; have been president since about 1866, and have been a director of the company about twenty-seven years; have been a stockholder in the company since 1840 or 1841. I did not read the answer in this case before signing; I just signed it as president of the company; have never read it; do not know anything as to whether White delivered sixty-seven shares of stock to Lipscomb, as denied in the answer; know nothing of the facts of the renewal of the three certificates numbers 33, 36, and 39 in the name of Lipscomb; know nothing of the fact that these certificates were transferred to Love in good faith and for value; know nothing of the denial of the answer that White had twenty-four shares of stock in the company at the time of his death; it occurred long before my official connection with the company; know nothing of the transfer of the sixteen shares which the answer alleges were endorsed and delivered before White died; know nothing about the endorsements upon the three certificates which the answer alleges appear to be endorsed in blank; have never seen the endorsements that I remember; have no recollection of any action of the company or anything ever appearing on its minutes or papers about the transfer of David White's trustee stock; do not recollect that I ever heard of any claim of David White's heirs to stock, except from a conversation with Mr. Coryell, understood to be the agent in this case, and do not recollect of any communication of David White's heirs or representatives to the company; did not know that David White's heirs had any rights—not
115 that I remember; do not remember that the attorneys in this case made formal application to the company before suit. If such application was made don't think it would be re-

ferred to me as president; it would come before the directors if deemed a matter of importance to the agent, James P. Cole.

There is a report by the agent annually if there is a meeting. He reports lots sold, shares of stock sunk, but do not think he reports transfers of stock. The agent also keeps important letters on file; do not know whether we have or have not all reports of the agents from the beginning; every report is on record. The directory of the company fix price of lots for sale; do not remember when this suit was filed or what the directory did in respect to it; to the best of my knowledge it was filed since the war. I understand the suit to be for twenty-odd shares of stock. I never heard of any claim by White's heirs, except through Coryell. When the suit was brought, or after the time Mr. Coryell spoke to me, I made inquiry of the agent about the subject-matter of the suit; neither the directory nor myself, as president, made any inquiry other than of the agent; do not remember that the directory made any examination of the transfers on the certificates to see whether they were properly transferred or not; do not know that James Love ever received any conditional transfer of David White stock from Lipscomb, to be returned when called for; do not know anything about the company taking any indemnity bond from Lipscomb, Love, Borden, or Jones in regard to the transfer of White stock; it would probably have been before my time and I would probably not have known of it except as a stockholder; do not recollect about meeting Mr. Molton or Billingslea or Ware here in 1869 or at any other time. They might have seen me, but I do not recollect anything about it; if it had been anything about any claim for stock of the City Company I would probably have recollected it.

Cross-examined by W. P. BALLINGER, for defendant:

The secretary and agent of the company and its attorney give attention to its matters of litigation; do not remember that I ever read a petition or answer in any litigation of the company; if it was anything I had to swear to, then I would read it carefully. The present agent of the company, James P. Cole, was a lawyer of as high standing as any at the bar of Galveston previous to his appointment as agent, and has resided here since the commencement of the city—about the time I did, about the spring of 1839—and his high character as a lawyer was one of the main grounds for his selection as agent of the company. The directors of the company have the extremest confidence in his integrity and have always had.

Gail Borden stood very high as agent of the company, as a man for business qualifications and integrity. I commenced dealing in the stock of the company about 1840 and continued to do so. I never knew and never heard that the company had done anything wrong about the transfer of David White's stock; never
116 heard a rumor of it nor anything which led me to suspect that heirs or claimants under David White could have any claim against the company on account of David White's stock taken up by the company.

The stock, I think, was worth in 1840 and 1841 about $125 a share. I remember buying one about that time at that price from Stacy Lewis. The price of stock continued low for a number of years, and, acting for the Canal Bank of New Orleans, I sold sixty shares, and was limited to $150 each. My impression is it was sixty shares. I sold the last part at $175.

I knew Abner S. Lipscomb; became acquainted with him about 1840 or 1841, when he first came to Texas, and knew him down to the time of his death. I was his agent in this city for a long time before he became judge. He held some Government office, but I do not know what it was. He was one of the first supreme judges appointed after the adoption of the constitution of 1845, and continued so to the date of his death. This is my remembrance of it. There was no man in the Republic or in this State that stood higher than Judge Lipscomb. Do not know anything about his means, but he was a man in good circumstances; do not know how many shares of stock he owned at the time of his death. Bishop Odin bought two shares from his estate at $2,500 each. He consulted me and I advised him to buy. I am not a salaried officer as president.

Re-examination by GEO. E. MANN, counsel for complainants:

Do not recollect whether I did or not buy another share for $125. Within a year or two after the war one share was sold for $13,000, but this price did not continue long. It is now worth $9,000 asking price. In my agency for Lipscomb I did not transfer any stock for him. My agency was to pay taxes on his real estate in this city.

Recross-examination by W. P. BALLINGER, counsel for defendant:

When I first heard of the claim of David White's heirs to stock from Mr. Coryell my impression was that it was a speculative claim and not of a serious character; have no recollection of what facts were stated, but based my belief from the fact that I had never heard of it, and there were other claims which had been made which didn't amount to anything.

Question by complainants. Did not Mr. Coryell state to you that he had in his possession a statement by Judge Lipscomb that David White's heirs were entitled to twenty-one shares of Galveston City Company stock, and if you would let him see the books and the stock was properly transferred it would end the matter?

Answer. No; I don't think he said so. He may have said it, but if he did I don't remember it.

J. L. DARRAGH.

117 United States Circuit Court, at Galveston, in and for the Eastern District of Texas.

ASENATH A. WARE *et als.*
v.
THE GALVESTON CITY CO.

It is agreed that commission be waived and deposition of Thos.

J. Molton, of Montgomery county, Alabama, a witness for complainants, *to* be taken on following interrogatories and cross-interrogatories by any notary public or United States commissioner and returned by mail to clerk of this court and to be opened by him at the request of any solicitor of record in the cause; the deposition to have same force and effect as if taken and returned under commission in accordance with equity practice in the United States circuit court for which the same is taken.

MANN & BAKER,
GRESHAM & JONES,
M. C. McLEMORE,
BALLINGER & MOTT,
Counsel for Defendant.

Publication made November 3, 1882, by agreement in writing of counsel, and filed.

C. DART, *Clerk.*

Filed November 3, 1882.

C. DART, *Clerk.*

Deposition of Thos. J. Molton.

First interrogatory. What is your age? Where do you reside? How long have you resided there? Have you studied or practiced law, and when and where?

UNITED STATES OF AMERICA,
Middle District of Alabama.

Deposition of Thos. J. Molton, a witness sworn on the twenty-sixth, twenty-seventh, and twenty-eighth of October, 1882, at Montgomery, and in the county of Montgomery, under and by virtue of an agreement between the solicitors of both parties waiving commission in a cause in equity number 155, pending in the United States circuit court at Galveston, Texas, for the eastern district of said State, between Asenath A. Ware *et als.*, plaintiffs, and The Galveston City Company, defendant.

The said THOS. J. MOLTON, being first duly sworn to speak the truth, the whole truth, and nothing but the truth, doth depose and say as follows:

118 First answer. To the first direct interrogatory he saith: I am in my fifty-fifth year of age, and reside in the city of Montgomery, State of Alabama, and have resided alternately here and in the county of Montgomery since my birth. My main present occupation is farming. I have studied law and practiced it a short time after I arrived at twenty-one years of age and since at intervals in Montgomery, Alabama.

Second interrogatory. Have you read the bill and answer in this cause? Are you connected with the plaintiffs by blood or marriage; if so, how, and how long have you known them?

Second answer. To second interrogatory he saith: I have read the bill and answer in this cause, and am connected with plaintiffs by marriage with Mary W. Ware, who is a daughter of Asenath A. Ware, one of the plaintiffs, and granddaughter of their ancestor, David White. I have known all the complainants since about the years of 1834 and 1835.

Third interrogatory. Who are the next of kin by descent of David White, deceased, and who are the heirs-at-law, and what were their respective ages or the ages of those through whom they claim as heirs at the date of the death of David White?

Third answer. To third interrogatory he saith: The next of kin by descent of David White, deceased, are Asenath A. Ware, his daughter, and Mary Ann Haltzclaw, wife of James F. Holtzclaw, and Thomas W. Cowles, her brother, who are grandchildren of said David White, and David O. White and his brother, Clement B. White, grandchildren of David White, and David P. Lumpkin, a grandson of David White; and the same identical persons are the heirs-at-law of the said David White. The ages of the said next of kin and heirs-at-law at the date of the said David White's death are about as follows: Asenath A. Ware, thirty-one years old; Mary W. Holtzclaw, eight; Thomas W. Cowles, ten; David O. White, fifteen; Clement B. White, twelve, and David P. Lumpkin, nin-teen years old.

Fourth interrogatory. When did David White die? When did his widow, Mary White, die?

Fourth answer. To the fourth interrogatory he saith: David White died December 10, 1841. His widow, Mary S. White, died the fourth of September, 1853.

Fifth interrogatory. What diligence, if any, has been used by the legal representatives of the estate of David White, deceased, or the heirs of David White, deceased, to ascertain or enforce their rights as to the matters involved in this suit in or against the defendant, setting out connectedly and in detail the whole history as to what has transpired in connection with and concerning the matters involved in this suit from death of David White to bringing of this suit?

Fifth answer. To fifth interrogatory he saith: As to the diligence inquired of in fifth interrogatory used by the legal representatives of the estate of David White or his heirs to ascertain and
119 enforce in and against the defendant their rights as to matters involved in this suit, setting out connectedly and in detail the history of the same, witness submits the following statement as true in substance and in fact:

The diligence of Rob't J. Ware, the executor of David White, to ascertain and prosecute the rights of the estate as to all Texas interests is show- by his correspondence as to the same. David White had died, leaving a large estate in Alabama worth about one hundred and fifty thousand dollars, beside property and claims in Florida and in Texas of unascertained value. Dr. R. J. Ware, his son-in-law and acting executor, husband of the plaintiff Asenath A.

Ware, was a man of great wealth and had his own business to look after, which occupied much of his time.

David White dying the tenth of December, 1841, and Dr. Ware, having been appointed one of his executors, alone qualified as such January 18, 1842. During that year he employed Dr. Clement Billingslea, a man of character and business ability, a nephew of Mary S. White, who was the wife of David White, to make a trip to the Republic of Texas to inquire into and look after the business of White's estate, and on the twenty-second of November, 1842, he executed a formal power of attorney to said Billingslea for that purpose, herewith filed, marked Exhibit No. 1, and which was enclosed by Ware to Billingslea in a letter dated November 23, 1842, herewith filed as Exhibit No. 2. After seeing Abner S. Lipscomb, the Texas attorney of David White, at his home, in Washington county, Texas, Dr. Billingslea wrote R. J. Ware, December 21, 1852, from Houston, Texas, concerning various matters in which the estate was interested, and explains, among other things, that he finds that David White had been allowed by the Galveston City Company shares of Galveston stock on a compromise of some of the matters between said White and the company, and Billingslea says he will get this stock when he arrives in Galveston. The letter shows that he had little or no knowledge of White's Texas matters other than as drawn from Lipscomb and is largely taken up with matters concerning a balance due by White's estate to the Republic of Texas. This letter is herewith filed, marked Exhibit 3. On the return of Dr. Billingslea to Alabama he wrote a letter to R. J. Ware from Montgomery December 3, 1843, giving a lengthy account of the status of matters as between the Republic of Texas and estate of David White. In this letter he says he is of rather a suspicious temperament and extracted all the information possible in a cautious manner and would have felt better if Lipscomb had met him in Galveston and had gone more into details. He said that Lipscomb was complaining when they parted on the Brazos, and, after awaiting Lipscomb's arrival five days, he received a letter from him. In another part of Billingslea's letter he said in substance that he met Gail Borden, the clerk of the Galveston City Company, a Baptist, and, he thinks, an honest man, who promises to send him a statement of original number and transfers of stock. This letter is
120 herewith filed and marked Exhibit No. 4. On the twelfth of January, 1843, Billingslea again wrote to R. J. Ware, furnishing data as to property owned by Galveston City Company and other matters connected with interests of the estate of David White in Texas, which is filed as Exhibit 5. On December 24, 1842, Abner S. Lipscomb wrote a letter to Dr. R. J. Ware, which he sent by Dr. Clement Billingslea. This letter was in 1869 among the papers left with W. P. Ballinger and which was never returned to witness, but is No. 1 of the index to or memorandum of the papers I left with said Ballinger to facilitate his examination of said papers, and is a verbatim copy of said letter of Lipscomb to said Ware as taken from the original. Gail Borden, Jr., then agent of the Galveston City Company, made full report to Dr. Clement Billingslea, in accordance

with his promise, as before mentioned, in letter marked Exhibit 4, of all stock ever issued to David White. This report was formally and carefully prepared and showed on its face that it had required considerable labor in its preparation, and it purported to be a formal statement in detail by the agent of the company that all sixty-seven shares of the stock of the company had been duly transferred by A. S. Lipscomb under power of attorney of David White, except five shares, the original certificates of which had been issued to David White, but until these five certificates were brought in for renewal the company could not tell whether they belonged to estate of David White or had been duly assigned.

R. J. Ware, on the fifth of March, 1854, wrote to A. S. Lipscomb making inquiry as to the condition of White's estates in Texas and complaining as to his inability to get at the true condition of things and expressing fear of something being wrong, and he had not heard that Gallaspie was dead nor that the suit against Menard had been dismissed until six months before, and asking what lawyer could be obtained that could be relied on, and that he had got no satisfaction from John B. Jones; which letter is hereto attached as Exhibit 6.

The statement of the company was taken as correct, and R. J. Ware seems to have rested on that and, as far as correspondence and memoranda show, considered the stock lost to the estate of David White as to any rights as against the Galveston City Company, the stock having been certified by said company to have been duly transferred. Lipscomb was considered insolvent and otherwise deeply involved to estate of David White as to other matters. In 1844 Dr. Ware went to Texas to see Judge Lipscomb as to lands and other matters connected with the estate of David White, but did not see him, as he was so long delayed by high water on the Trinity river that he had to return to Alabama to meet business engagements here without seeing Lipscomb. The Galveston City Company remained under the same management as to the affairs of its office until 1854, when one James P. Cole, a lawyer of respected ability, was made the agent of the company to succeed Gail Borden, Jr.,

121 who had furnished statement (as above mentioned) as to all the sixty-seven shares originally issued to David White had been transferred, except five, which, being outstanding, could not be reported on by the company, and on this change of the agent of the company R. J. Ware, by letter, requested one A. F. James, then acting as his Texas agent as to other matters, that he make inquiry as to the said shares of stock. James P. Cole, the agent of the Galveston City Company, in response to this inquiry, made a tabular statement (which he called a historical record of David White stock) as to each and every one of the sixty-seven shares, which shows and formally certifies that all of the certificates of said shares had been duly transferred by David White or A. S. Lipscomb, as attorney-in-fact, prior to David White's death. These two reports of Gail Borden, Jr., and Jas. P. Cole, the agents of the company, are on file in this cause as part of the testimony of Jas. P. Cole taken in the presence of this witness at Galveston, August, 1882.

There is no intimation given R. J. Ware, the executor of David White, by A. F. James, in his letters, as to said James being in any way connected with the company. The said deposition of J. P. Cole discloses the fact that A. F. James was at the time a director and large stockholder in said company and actually had previously had connection as agent of others with several of the certificates of the David White shares that were among the five certificates reported outstanding and status unknown by the report of Gail Borden, Jr., the agent of the company, the defendant. It appears from letters of A. F. James, J. D. and D. C. Giddings, and others, from 1853 to 1859, that R. J. Ware was exercising due diligence to ascertain any and all rights of the estate as to the Texas matters James reported by letter of the nineteenth of September, 1854; that he had made full examination as to the stock, and that all sixty-seven shares had been duly transferred by White and his attorney-in-fact, Lipscomb, and gave no intimation of the many irregularities on the face of the so-called transfers of said certificates of stock, which for the first time are made known to the complainants by the answer of the company in this suit.

From some cause or other, it seems from letters to R. J. Ware, from A. F. James, and J. D. and D. C. Giddings that Ware was not fully satisfied by the certificate and statement of the company, by its agent, J. P. Cole, nor the statement of A. F. James, but wanted still further investigation of the facts and employed lawyers of high standing, J. D. and D. C. Giddings, to go from Brenham, Texas, to Galveston, and make examination of the transfers of stock, and they write, September 14, 1858, to R. J. Ware, that they will make the examination, if allowed to do so. From deposition of Jas. P. Cole in this cause it appears that on the twenty-first of April, 1858, the company, the defendant, through its directory, had passed a resolution sealing its books against examination. Rob't J. Ware died the first of November, 1867, in the city of New York, after several years of ill health. The war had intervened, and communication for years was mostly cut off with the trans-Mississippi States, and under process of reconstruction, as well as by law, the statutes of limitations in Texas were
122 suspended from 1860 to March, 1870. However, in the spring of 1869, as soon after the death of R. J. Ware as it was possible for me to do so, I was sent to Texas, as agent of heirs of David White, for the special purpose of prosecuting further inquiry as to any and all unsettled matters relating to the estate of David White, and especially to examine carefully into the facts of the transfers of the shares of the stock which the company had twice certified had been duly made, as the form of the transfers had never been given by the company, but its statements that said transfers had been properly made had been accepted and acted upon as true, and no suit had been brought. Since the death of Abner S. Lipscomb memoranda in his handwriting, and in some instances signed by him, had been found among Lipscomb's papers and had since 1860 come into my possession and knowledge, and which, among other things, showed that on the ninth of January, 1844, A. S. Lipscomb claimed

to have twenty-one shares of the capital stock of Galveston City Company belonging to the estate of David White, and it seemed he had prepared and signed an order on James Love, the then president of the company, for sixteen shares of stock to be delivered by said Love to R. J. Ware, as executor of David White, and an unsigned receipt written by Lipscomb for Ware to sign, bearing same date, for four shares, and for said order for sixteen shares, and this date (January 9th, 1844) was the time Lipscomb expected to meet R. J. Ware in Texas, but was prevented by overflow of the Trinity river; and also among Lipscomb's papers was a receipt purporting to have been signed by James Love, dated fourth of March, 1842, acknowledging the reception from A. S. Lipscomb of thirty shares of Galveston City stock subject to Lipscomb's order, and this receipt corresponded in its date with the date of renewal by Love of sixteen shares of the stock of David White, and these facts taken together were, to my mind, utterly at variance with the statement of the company, in 1843, by Gail Borden, Jr., its agent, that the sixty-seven shares, excepting five, had been regularly assigned by Lipscomb, under power of attorney from White, prior to the latter's death, in 1841, and of its certificate in 1854 by its agent, James P. Cole, that all sixty-seven shares had been duly transferred before the decease of White, because Lipscomb's known ability as a lawyer precluded the idea that he would have transferred sixteen shares to James Love, when Love's receipt showed that it was a mere deposit with Love, subject to Lipscomb's order.

The firm of Ballinger, Jack & Mott, lawyers, at Galveston, Texas, had been and then were (in the spring of 1869) representing the interests of David White's estates in other matters, and I personally conferred with them, and especially William P. Ballinger, the senior member of the firm, at great length, for nine or ten days, as to the Texas interests of the estate of David White, and particularly as to this matter of the shares of stock, and placed in his hands all papers and memoranda in my possession bearing on the same, and I personally prepared for him, to facilitate him in his use of such
123 papers and memoranda, a lengthy index or description of the same, which is herewith annexed and marked Exhibit "A;" and after close and elaborate consultation said firm (Ballinger, Jack & Mott) accepted the employment as attorneys to represent the interests of White's heirs against the Galveston City Company for the shares of stock referred to, and I thereupon prepared a demand on the company for access to its books and papers. The original draft or rough copy of the demand as written and of which a copy was handed by me twenty-eighth of April, 1869, to J. P. Cole, the agent of the company, is herewith filed and marked Exhibit "B," and the interlineations and additions to said rough draft of letter to the company were made by Judge Ballinger and are in his handwriting. The company made no formal or written reply to my said demand, but I several times within a few days that succeeded the time I presented the written demand called at its office and was repeatedly refused, being told by James P. Cole, agent, that the company would not grant me the inspection asked nor show their books or

papers or any extracts therefrom, and thereupon I left the whole matter and all papers concerning it in Judge Ballinger's hands, with instructions full and positive that they should push the claim with all possible vigor, and the promise that I should on return to Alabama forward them any additional papers or memoranda bearing upon the White stock transactions, and said Ballinger told me they would unseal the books and inspect the papers of the company and obtain desired information and all particulars of the transfers of the David White stock if it took the *posse comitatus* of the whole of Galveston county. After this I sent the firm of Ballinger, Jack & Mott a large number of additional papers that I thought would be of service in the suit they were to institute against the Galveston City Company, and a lengthy correspondence ensued between us as to this and other matters, and showing that the claim for this stock remained in their hands, they assuring me frequently that the delay in commencing proceedings would not operate any prejudice in law to the assertion of the rights of White's estate or his heirs, and giving reasons therefor that prevented my supposing that he was not in good faith representing our claim or that their delay would in any manner affect our right of action. I herewith produce a number of said letters to be filed herewith and identified as Exhibits "A 1," "A 2," "A 3," "A 4," etc., all of which are in the handwriting of W. P. Ballinger, the solicitor of the defendant, The Galveston City Company, in this suit, which involves the identically same matters and rights I employed him for in 1869, and placed in his hands, therefore, all papers and data of the complainants in the present suit, and from the knowledge obtained from which data and papers (many whereof are still withheld from us) the answer of the company, as prepared by its counsel, is largely drawn. It was not until about 1878 that I became satisfied that Ballinger did not intend to prosecute against the Galveston City Company a suit. As soon after I so ascertained as I could possibly arrange to go, the plaintiffs again sent me to Texas, and in the spring
124 of 1879, at Galveston, I called upon Judge W. P. Ballinger and requested him to return to me all the papers and writings I had left with him in 1869, and the memorandum or index thereof, which I had made out at his request and handed him for his greater convenience in preparing for the suit he was about to institute against the company for the White heirs, and also all the additional papers I had in 1869 and afterwards forwarded to his firm bearing upon or in connection with said proposed suit. He did return some of said papers, and my index of those I had personally left with them, but reported that some had been mislaid, which he would afterwards deliver to me or to Mr. Coryell for me, if ever found, but which promise was never redeemed; and among the papers never returned to me or any one for me were the following, to wit: The one marked No. 1 of the said memoranda or index heretofore filed with this deposition as Exhibit A, which was a letter from Abner S. Lipscomb to Dr. Robert J. Ware, of December 24, 1842; No. 4, copy of memorandum from Lipscomb as to stock (not signed); No. 6, copy of Lipscomb's order on Amasa Turner for two shares of stock

loaned by him to Turner, dated July 3, 1840; No. 7, copy of order of Lipscomb on James Love, January 9, 1844, for delivery of sixteen shares of Galveston stock to R. J. Ware; No. 8, copy of receipt prepared by Lipscomb for Ware to sign for said sixteen shares, and four others, dated January 9, 1844 (but not signed); No. 11, which was a copy of an original receipt then held by representatives of Abner S. Lipscomb, as follows:

"I have received this day from A. S. Lipscomb thirty shares of Galveston City stock, which I promise to return to him whenever thereunto requested. Value received March 4, 1842.

"(Signed) JAMES LOVE."

Also copies of numbers 9, 10, and 12 of said memorandum or index given by me to Ballinger and which is Exhibit "A" of this my deposition. The above-mentioned copy of receipts of James Love to A. S. Lipscomb was made by and is in the handwriting of the deponent, Thos. J. Molton, and the original thereof, after diligent search and inquiry, cannot be found and I suppose was lost or mislaid in change of Lipscomb's papers from hand to hand; but I understand that Judge Ballinger is a nephew of James Love and familiar with his handwriting, and that said Ballinger has the original and knows it to be genuine. After getting back such papers as I could from W. P. Ballinger, I employed Mann & Baker, attorneys, at Galveston, who, in going over matters with me, informed me that in a suit filed by them in 1868 and finally decided in 1875, for one Scott against Galveston City Company, in which W. P. Ballinger was of counsel for said company, it appeared from records of the company introduced in evidence that in 1851 the company made formal acknowledgment and provision for the payment of debt due by said Galveston City Company to David White's estate of $14,450, being a balance then owing White on the
125 $50,000 paid by him as the purchase-money of the league and labor of land, the capital of the company, and that the company then held property in trust to secure this debt to White; that this acknowledgment of the company of said debt and provision for its payment was duly entered in the minutes of a directors' meeting and seemed to be put therein to protect the company's original promoter and agent, Michel B. Menard, who individually had bound himself for said debt to White by incurring it in his own name, while in truth and fact he was agent and acting for the company. This was the first knowledge any representatives of White's estate or his heirs had ever had that the Galveston City Company was the acknowledged principal and Menard only its agent, and while the company, probably for Menard's protection, in 1851, ten years after its incorporation and nearly ten after White's decease, was secretly on its minutes acknowledging its indebtedness to White's estate, and that it held a trust provision of a number of shares of stock out of which to pay said debt, at that very time the said Menard was defending a suit on the same debt against White's administrator on the ground both of limitation and of there being nothing due the estate of David White, and his heirs had at three

different times, as before testified, sent agents to Texas and had thereby and (otherwise) made repeated inquiries of the company concerning White's interest, and said company had always led them to believe that White's estate had no interest in the company. I concluded that the action of the company amounted to direct fraud and concealment of fraud, and in violation of the trust it held for payment of the $14,450 that it had solemnly admitted on its record in the secrecy of an office. Sealed against inspection by resolution of directory and under advice of counsel, I had suit brought against Galveston City Company on behalf of my principals, the same complainants in this cause, for foreclosure of lien for said debt, and that suit is now pending in the Supreme Court of the United States. I had also made a written demand on the company, March 19, 1879, addressed to the president and directors of the Galveston City Company, for examination of its records, books, and papers as to the disposition and transfers of White's stock, which demand I personally presented at the office of the company to its agent, Jas. P. Cole, on the day of its date, and of which I now here produce an exact copy, to be filed as Exhibit "B." To this second written demand the company made no written answer, but J. P. Cole, the agent, told me I could not be allowed to examine the records, and within the next few days thereafter I made several personal applications to said agent, Cole, for access to the company's books or for authentic information therefrom as to the time, manner, and form of the transfers of the White stock, but he still persisted in refusing said access to any information or satisfaction in relation thereto.

The discovery of the fraudulent and deceitful conduct of the company in concealing the rights of the heirs of David White as to the debt incurred for the very purchase-money of the land,
126 the capital of the company, coupled with its continued refusal to give us an insight into the full history of the White shares as to the question and time of assignment thereof, crystalized suspicion as to the alleged transfers into belief that the company had not told the truth when it had certified that all the shares had been duly transferred by White and his attorney-in-fact, Lipscomb, before the death of White. While before the character of the agents of the company and their reputed ability to know what duly transferred meant negatived any right to draw inferences against the truth of their formally certified statement as to the White stock, now that we were advised of their fraudulent conduct towards us in other matters, the said heirs of White felt they had the right to presume everything most strongly against the company. I therefore assisted my lawyers to get up data on this basis for the bill in this cause and alleged that transfers had been made by Lipscomb, "attorney-in-fact," with naked power to sell after White's death, when the only data we had were the two statements of the company that the certificates, though presented to the company after the decease of White, had been duly transferred before his death, and I alleged that Lipscomb had transferred certificates from name of White into his own individual name of Abner S. Lipscomb when we did not know that such was the fact; and it might have been,

for aught we knew, that David White had personally assigned said certificate to Lipscomb, and this fully authorized the transfers, as the company had certified it had properly done. I considered the now discovered fraud on White's estate and its repeated refusals to allow me to see the transfers sufficient presumption of false statement by the company to justify making the allegations in the bill, when in fact they were based upon suspicion and presumptions and directly opposed to the statements of the company, which were the only direct facts known or accessible to us. It certainly never was known nor imagined that it would turn out, as disclosed by the company- answer to our bill, that after White's death the company recognized and itself bought under endorsements made on certificates by an attorney-in-fact—an able lawyer—that did not, in their terms, even pretend to be transfers of the shares and were in the very teeth of the terms of the certificates and of the power under which they were issued and which were recognized by the company in its own favor and against the heirs and estate of David White without any evidence whatever of their having been made for any value or valuable consideration passing to David White or to his attorney-in-fact or his estate, and many of said transfers without date, even as to the signature on them, and none of them showing that any sale at all was contemplated by the attorney-in-fact, with only naked power to sell for a non-resident principal who was dead when the certificates were presented to the company. The answer to the bill has caused plaintiffs' want of knowledge and allegations on these points, and from intimate acquaintance with the current facts for many years and careful investigations of and familiarity with all the papers and matters of David White's estate I can say now most positively that the sixteen shares, numbers 116, 118, 119, 120, 121, 122, and 124, in Book A, and 34, 42, 43, 44, 45, 46, 47, 48, and 49, in Book C, which the company allowed James Love, its then president, to use, and the four Ashbel Smith was permitted to use, numbers 31, 32, 40, and 41, in Book C, and the one, number 27, in Book C, it suffered Levi Jones, its once president, to use, were recognized by the company as having been transferred as against White's estates and heirs when there has been no legal transfer and neither the estate nor heirs have ever gotten any consideration therefor, directly or indirectly, and when, if there was any honesty or integrity in Abner S. Lipscomb, he considered them the property of the estate of David White, and so pronounced them long after the said White died, and Lipscomb's memorandum or statement of January 9, 1844, shows that if the company had made inquiry it would have found that the shares had not been sold by him.

127

To the last interrogatory he saith:

Complainants (including Mrs. Asenath A. Ware, residuary legatee under the will of Robert J. Ware, and entitled as such to whatever interest, if any, in the said stock her husband may have acquired by virtue of the transfers by some of the complainants), in order to simplify, save expenses, and rid themselves of the troublesome question of forced heirship in Texas, had, before the filing of this bill,

mutually agreed to participate in and prosecute their respective interests or claims in their capacity of heirs-at-law of David and Mary S. White, these complainants being all capable of contracting *inter sese* and being all the persons that ever took any interest whatever in either estate of David or Mary S. White under the law, the wills or the transfers, and every interest in the subject-matter of this controversy being represented in the present complainants.

To this last interrogatory, being the sixth, he saith also:

I found when I went to Galveston the first time that the lots that Lipscomb had bought from the City Company with David White stock were put in his (Abner S. Lipscomb's) individual name, and in 1845 he put a portion of said lots in the name of one Memucan Hunt, one-half for White's heirs and the other half to pay his (Lipscomb's) indebtedness to one Nicholas Lewis and after Lipscomb's death, while before he had appropriated to himself the majority in number and value of the thirty-two lots; his heirs and widow claimed all the balance of the lots and suits had to be brought for their recovery.

THOMAS J. MOLTON.

The deponent, after answering the fifth interrogatory and getting out of his satchel the papers out of which I was to attach my answer thereto, as Exhibits B and C, and also A 1, A 2, A 3, A 4, A 5, A 6, A 7, A 8, A 9, A 10, and A 11 as part of my said answer,
128 found that portion of his exhibits missing, and after diligent and thorough search and inquiry he fails to find them and declares them lost; but while in Galveston, Texas, last August, among other of our Texas papers copied by me in pencil in a little bound book now before me, I made verbatim copies therein of two written demands I made upon the company in 1869 and 1879 for access to its books and information therefrom about the stock, marked as Exhibits B and C, and all in W. P. Ballinger's letters concerning the White stock in the Galveston City Company, as Exhibits A 1 to A 11, inclusive, and which I had intended to annex to my answer to said interrogatory, and to so file. Now, just before closing my depositions, and having lost said originals, I have had said book divided and volumed in two volumes, one of which, containing true and literal copies of the papers described, I attach hereto as said exhibits and so marked as they occur in said book, from pages 4 to 53, inclusive. Deponent asks that the exhibits in said book copied and hereto attach- be taken as part of my answer to said fifth direct interrogatory. The copies of my two written demands on the company are on pages 48, 49, 50, 52, and 53 and the extracts from Ballinger's letters are from pages 4 to 26, inclusive, of said book filed.

THOMAS J. MOLTON.

(EXHIBIT 1.)

THE STATE OF ALABAMA, }
Montgomery County. }

Know all men by these presents that I, Robert J. Ware, of the State and county aforesaid, have made, constituted, and appointed Clement Billingslea, of said State and county aforesaid, my true and lawful attorney, for me and in my name, stead, and place to do, act, and transact for me any and all kinds of business in which I am interested; to settle, compound, and receive and collect for me; to give receipts and acquittances for me, and in general to transact my affairs; also for me and in my stead and place to do and perform all acts that I, as executor of the estate of David White, deceased, could do were I personally present; to settle, compound, collect; to receipt and acquittances to make for me and in my name as executor as aforesaid, hereby ratifying and confirming all legal acts that my said attorney may do in and about the premises.

In testimony of which I hereunto set my hand and seal this 22d of November, A. D. 1842.

ROBERT J. WARE. [SEAL.]

THE STATE OF ALABAMA, }
Montgomery County. }

I, Joseph D. Hopper, clerk of the county court of said county, do hereby certify that Robert J. Ware personally appeared before me and acknowledged that he signed, sealed, and delivered the above instrument to Clement Billingslea on the day and date thereof.

In testimony of which I hereunto set my hand and seal official this the 22d November, 1842.

JOS. D. HOPPER, *Clerk.*

129 THE STATE OF ALABAMA, }
Montgomery County. }

COUNTY COURT, CLERK'S OFFICE.

Special Orphans' Court.

January 18, A. D. 1842.—Present: The Honorable Benajah S. Bibb, judge.

This day came Robert J. Ware and applied for letters testamentary in and upon the estate of David White, deceased. It is ordered that letters issue to him upon his complying with the law.

This day came said Robert J. Ware and entered into bond in the sum of two hundred thousand —, with Thomas M. Cowles, Clement Billingslea, and James A. Ware, securities; which was approved and ordered to be recorded.

And said Robert J. Ware having entered into bond and taken the oath prescribed by law, it is ordered that letters testamentary as aforesaid issue to him; which is done.

I, Joseph D. Hopper, clerk of the county court of said county, do hereby certify that the foregoing is a true copy from the minutes of the orphans' court in relation to the appointment of Robert J. Ware executor of the estate of David White, deceased, and that said R. J. Ware is the now acting executor of said estate.

In testimony of which I hereunto set my hand and seal official this 22d November, A. D. 1842.

JOS. D. HOPPER,
Clerk C. C. M. C.

Endorsed as follows:

"Power of att'y to Dr. Billingslea. $200 was paid Dr. Billingslea for this trip.

"R. J. WARE."

(EXHIBIT 2.)

STEAMBOAT FAVORITE, 23*d November*, 1842.

DEAR DOCT.: Enclosed you will find a power of attorney, etc. As you will see, on my way to Cahawba. Left all well. Now for business. The boat shakes so much I fear you will not be able to read. On examining the account current you will find $23,000 in favor of D. White. This account, however, I think says nothing about the $50,000 accepted by D. White as the agent of Texas. As I stated to you, the question may arise how far the agent is bound for the $50,000 when acting for the Government; gave this matter due consideration, if bound in his individual capacity. Has it not been paid by Menard, Williams, or others, owners of the Galveston island? Judge Lipscomb ought to be able to inform you. If not paid, why has it not been, as D. White had the power to raise the sum from the sale of the island. The judge has all the papers relating to the subject, and it appears the default must have been with him. Examine Secretary Smith's letters to
130 D. White, which may throw some light upon the subject as to his individual liability. See, also, Williams' letters as to the amount due, as supposed, in 1839, say only $15,000. See, also, Col. Horton's letters as to the interest of D. White in his hands; also Turner's letters, etc. Keep your hand dark from all persons except those in whom you can repose the utmost confidence. The claim, as I understand, is held by Hall, and not the government of Texas, which should make you still more particular. Make no admissions whatever as to its justice or equity, and do not expose the name of your witness as to the settlement, unless you are fully satisfied the matter can be satisfactorily adjusted. Assertain as far as possible the locations of D. White that have been made complete, if any; those remaining unfinished; and make the necessary arrangements to complete those unfinished, if any. Write me from New Orleans and when you arrive at Galveston, and as often as convenient, and may God prosper your voyage and bring it to an early and happy termination is the sincere prayer of your friend,

ROBERT J. WARE.

N. B.—Tell Robert J. Crawford I send by this boat some fishing poles to him.

(EXHIBIT 3.)

HOUSTON, TEXAS, *December* 21, 1842.

MY DEAR DOCT.: I arrived here at dark, after a very unpleasant journey to Washington, etc., having found our old friend Lipscomb there. We went down to his house and then back to Washington again to examine the records, but could not get any information, as the archives are detained in Austin by the populace, contrary to the proclamation of the President. I feel much better satisfied now that the estate of uncle will not suffer by the operations here than I did before I came over. Uncle had sent several of the original vouchers and an exact copy of the account current you gave me to the judge by Mr. John Dunan, and the judge has retained one other voucher of Menard to go to the estate's credit of $8,550. Menard and others, fearing uncle would sacrifice the Galveston stock to raise the $50,000, made a compromise with uncle, allowing him so many shares (which I can and will get when I reach the island of Galveston), and also to make uncle secure in the refunding the amount he had accepted to the government (as their agent), gave him a mortgage on the whole of the Galveston property, which mortgage the judge has in his possession, and which is duly recorded in the clerk's office at Galveston. I do not know what amount Bernard owes uncle, but Judge Lipscomb is to meet me at the island on the first of next week to make out a statement of all uncle's business. I shall then bring the mortgage, Galveston stock, and all the original vouchers home with me. I showed my vouchers to the Secretary of the Treasury and he said his mind had undergone a great change about the matter, for he had looked upon uncle as a defaulter to the amount of Galveston purchase. He asked
131 me what amount the estate owed yet. I told him not much, if anything; that the Texas government might, in fact, owe him; that my object in making the exhibit was to find out and also to disabuse uncle's reputation as being a defaulter. Nothing can be done in the auditor's department until after the archives are given up, and they now find there is not so much coming they will be less active in urging. The judge thinks Menard is owing uncle enough to square off the government claim. The old government paper has been repudiated by the Texas congress and can now be got at a mere song—say $3 to $5 on the $100—and I am under the impression they will be obliged to take up their own money where individuals hold it and are indebted to the government. If so, any balances will be easily met. This, however, I intend to keep dark until I learn more about Menard's indebtedness and willingness and ability to pay. I start in the morning for the Trinity and shall send this down to Galveston to go with the Neptune in case I do not reach there in time to go myself, and, so soon as I can leave, shall return home. I hope to be at home in a week or ten days from the time this reaches you, provided it goes direct. I have got

enough of Texas for the present, and regret my trip to the Trinity to see after our old business. Lands here are a mere drag and expense at present. I must close, as I am really tired and have to write another letter yet to-night.

Very truly yours,

CLEMENT BILLINGSLEA.

Dr. R. J. Ware.

(EXHIBIT 4.)

MONTGOMERY, *December* 3, 1843.

DEAR DOCT.: I reached this place last night in better health than when I wrote last. I have had a rough and disagreeable time in the vexatious delays, bad roads, etc., in Texas. I mail to-day a letter from Judge Lipscomb to you, giving some account of your business. The archives are in the hands of the populace at Austin, the Congress and heads of departments at Washington; consequently I could not learn the particulars for want of access to the auditor's, secretary's, and treasury's old books. This difficulty will exist until after the action of Congress on the subject. From what I can learn, Uncle White really had not received drafts on Mobile, but wrote the letter (a copy of which Campbell & Chandler showed you) to the Texian government to enable the Galveston City Company to get the patent from the government to the island league. At the same time Menard gives Mr. White a mortgage on the whole property to indemnify him against any loss on account of this acceptance, and Menard still owes the estate, but what amount I could not learn, as he was absent from Texas and his friend and relation, Peter Menard, could not tell anything of their business. Judge Lipscomb had a copy of the account current you gave me, which Uncle White had sent out by John Duncan to him, with many of the original vouchers, in order to make a settlement with the
132 the government, and Lipscomb had obtained from Menard another voucher for $8,550, which Menard had taken up, all of which original vouchers, together with the mortgage, I have brought back with me. It would seem, from all the information I could get, that uncle owed the Texian government on account

scrip	$106,080 00
And on account of the Galveston purchase	50,000 00
Making a total of	$156,080 00
The estate now holds vouchers and commissions to the amount of	138,116 89
Leaving a balance of	$17,963 11

unaccounted for. Lipscomb says that Menard owes the estate more than the amount due the government for the Galveston acceptance, and thinks he is fully able to meet this demand, whatever it may be, and the balance, which seems to be due on account of scrip, he thinks may be discharged by getting their old repudiated treasury notes. I cannot see myself the distinction—why the whole amount

may not be paid in their own money. I have read Lipscomb's letter to you and see he makes a discrimination, but there may be a motive for that. I am rather of a suspicious temperament, and have acted with all the caution possible, before I broached the matter, to get all the information I could. I should have felt better if he had met me in Galveston and gone into more detail. He was, however, complaining when we parted on the Brazos, and, after waiting his arrival five days, I received a letter by his son and the one to you also. The lands belonging to uncle have been located, and is a joint operation between uncle, Lipscomb, and Bates of Mobile; but Lipscomb says that Bates did not pay his portion of the expenses of survey, etc.; that uncle advanced it, and that the estate should be remunerated by Bates.

I shall get a copy of the original amount of Galveston stock and the different transfers from G. Borden, who is the clerk to the company and also collector of the port. He is a Baptist, and, I think, an honest man, and seemed much interested in my business. I left him at Washington, and so soon as he reaches home he will write me. I have much more to explain when we meet. If their treasury notes *is* a good offset, one thousand dollars in cash will buy more than enough to meet the estimated demand which now seems to be due, without any assistance from Menard. Let me hear from you very soon. I shall try to get home this morning.

Yours truly, C. BILLINGSLEA.

(EXHIBIT 5.)

ARARAT, *January* 12, 1843.

MY DEAR DOCT.: I reached home on the third of January and wrote you at length per mail; also sent you Judge Lipscomb's letter from Montgomery before reaching home. Cousin Ann has been at home now near a week. All our families are in pretty good health.

Holton will finish your cotton in all this week, provided it
133 holds fair. I have gone and sent several times to the office with a hope to receive an answer to my letter. I am still uneasy that Lipscomb's or mine did not reach you. I regret to inform you that Dr. Jno. Oliver is dead. Dr. Withers, of Washington, and and Dr. Armstrong, of Montgomery, died before I reached home. As you may want some legal advice on the Texas business, I will give you a copy of the accepted draft, and also add something from the last printed report of the Galveston Company.

Copy of acceptance, which I think is an exact copy from the original:

" December 14, 1836.—I, David White, agent of the government of Texas, appointed for the special purpose of receiving from M. B. Menard the sum of fifty thousand dollars in cash or approved acceptances in New Orleans or Mobile, certify that I have received to my satisfaction approved acceptances from said Menard on two drafts on the city of Mobile, the one, payable on the first day of February next, for the sum of thirty thousand dollars, and the other, payable in two months thereafter, for the sum of twenty thousand

dollars, all of which is given and receipted for, and in consideration of the sum due the Republic of Texas for and on account of sale made to said Menard by the said government of the league and labor of land situated on and including the east end of Galveston island.

"(Signed) DAVID WHITE,
"*Agent Texas.*"

GOVERNMENT STREET, MOBILE.

On this claim Lipscomb says has been paid, say, $44,000, leaving a balance of about six thousand dollars due on account of Galveston island. The balance of this amount he thinks Menard can and will pay or arrange, and the balance now seeming to be due the Texas government of, say, $12,000, can be discharged by their repudiated treasury notes, which can now be purchased for three to five cents on the dollar. Six hundred dollars will pay enough to cancel the balance of the debt. Menard, I think, must owe uncle much more than uncle owes the government on account of Galveston island. Upon the whole, I feel perfectly assured that the property there will be more than enough to pay the Texian debt, and can be sold for that purpose, if you prefer it; but the general impression there is that the Galveston property will be immensely valuable. This will of course depend on peace with Mexico. "The stockholders' report up to thirty-first of October, 1841," say they had sold 1,543 lots, amounting in the aggregate, $1,218,911.18, Texas money. Of this sum $901,011.65 has been paid on stock; disbursed, 68,388.33, Texas money; cash on hand, 13,233.94; amount due on sales, $236,217.26.

The company owe 3,516.07 par funds or 6,989.78 Texas money. They report 490 shares of stock have been extinguished in payment of debt, leaving 510 shares of stock outstanding, which, first
134 November, 1841, constituted the whole amount of stock of the company. Lots within the city limits that have been surveyed and remain unsold amount to 2,333. Those fronting the city and extending to the channel of the bay have not been surveyed or sold, amounting to upward of 400, and are considered of greater value than an equal number of any that have been sold. There remains unsold 2,864 acres of the city league without the city limits. The patent was exhibited and contains a league and labor of land, granted by the government, containing 4,605 acres. Its length is four miles 560 yards, by an average width of one mile 1,127 yards. First sale of lots was on April, 1838. The city contains 596 business and dwelling houses and a population of 3,000, and report four churches nearly completed and three wharves extending to the channel. Do write me and let me know what you are doing and done and whether you have received Judge Lipscomb's letter and mine of the 3d instant. If you have done all the good you can in the legislature, do come home when you can; do come.

In haste, yours truly, CLEMENT BILLINGSLEA.

(EXHIBIT 6.)

MONTGOMERY, *5th March*, 1854.

Hon. Abner S. Lipscomb, Galveston, Texas.

DEAR SIR: I have written you several letters in a year or two to which I have received no answer. Supposing they were miscarried from some cause and learning from Col. Walker, your son-in-law, you was in Galveston and would remain there until about the 11 V in holding the court for that place, I have again attempted to write you hastily in order to hear from you.

It would be unnecessary at this time to state the various reasons why I have not visited Texas since I saw you there. I had supposed the interest of the estate of D. White was in such hands as would give them the proper attention, and that they were receiving such attention as was necessary for their protection; and I hope such has been the case, yet I must confess I have some fears on the subject, not being able to hear from those who had the management of them. I did not learn that Col. Gillaspie was dead and the suit against Menard was dismissed until about five months ago, and have not as yet heard upon what grounds it was dismissed. Was it the plaintiffs could not recover? Please let me hear the reasons, if you are acquainted with them. I understand Gillaspie had a copartner at the time of his death. Who was he and what is he and where does he reside? I have written Judge Jones on the subject, and he, too, seems to be ignorant in the case. Will you, therefore, if you please, let me hear from you, before you leave Galveston, in relation to all the interest of the estate of D. White as you may have any knowledge of? Where will you probably be in
135 the month of April? Where shall I address Col. A. C. Horton? I have written him and can't hear from him. Will you have the goodness to recommend to me some active, energetic man (lawyer) in Texas worthy of confidence, etc. Now, my dear judge, from the long acquaintance and the position you occupied in relation to D. White to the time of his death, I trust you will take some interest in answering this letter and aid me as much as you can in the matters relating to his estate.

Very respectfully, your obedient servant,

ROBERT J. WARE.

(EXHIBIT A.)

1.

Judge A. S. Lipscomb's letter from Austin county, Texas, December 24, 1842, to Dr. Robert J. Ware, ex'r of David White, said:

"In the Galveston City stock Mr. White and myself were jointly interested to the amount of seventy-five or eighty shares. I am not positive as to the exact number, but it can be ascertained at the office of the company, in the city of Galveston. The whole was placed at my disposition, to be exchanged for lands if I thought it

most advisable. Under this authority, I have disposed of twenty-one shares for city lots in Galveston and one hundred and forty acres of land adjoining Velasco. The titles to the lots are in my name, but I am only the owner of one-half; the other half belongs to the estate of Mr. White. The titles to the one hundred and forty acres not yet made out. The lots were selected mainly by Mr. White himself."

2.

A receipt from White to Lipscomb of fourth December, 1838, is as follows, to wit:

"Abner S. Lipscomb is jointly interested with me in fifty-six shares of Galveston, out of which he has received five shares, subject to any defalcation, should there be any, in M. B. Menard's paying the full amount of the fifty thousand dollars paid by me to the Texian government.

(Signed) DAVID WHITE."

Judge L. says in a statement to Dr. Ware:

"The original of which this is a copy is in my possession.

"(Signed) ABNER S. LIPSCOMB."

3.

Statement of an account of Galveston stock belonging to the estate of David White and myself, etc.:

"Sixteen shares sold for lots in the town of Galveston, for half league of land on the waters of the Neches; the title all in my name, but the estate of Mr. White jointly interested with me.

"Five shares sold for the tenth of John Wharton's headright league at Velasco; title not yet completed.

"Five shares sold for twenty shares of the league and labor at Edwards' Point; certificates in my own name.

136 "Received sixty-two shares in all—I was jointly interested in fifty-six of them—leaving on hand for the estate of D. White twenty-one shares (21). I advanced to D. White five thousand dollars, part payment of the draft in favor of T. J. Green. One thousand dollars was paid in Mobile to me by D. White and two thousand dollars has been paid Michael B. Menard, leaving two thousand unpaid. It was all to have been paid out of the money coming from Menard to White.

"(Signed) ABNER S. LIPSCOMB.

8th January, 1844."

4.

Statement of account of Galveston City stock not signed, but in the handwriting of L. and among the papers in the hands of the executor of L.:

"Shares on hand: 20 Gail Borden, agent.
" " 16 Levi Jones, agent.
2 David White.
2 loaned to Amasa Turner.
5 sold for Velasco land.
5 " " San Louis "
15 sunk for Galveston lots.
—
65

5.

Another paper among Lipscomb's estate documents:

Received of Thos. J. Green to A. C. Allen, for $5,000, on account of Galveston City stock, which amount was agreed to be credited by said Green on a draft in his favor, drawn by the government of Texas on David White, Texas agent at Mobile, dated third of February, 1837.

6.

Also Lipscomb's order on Amasa Turner, favor of W. B. P. Gaines, for two shares of Galveston City stock, loaned by said Lipscomb to Turner, dated July 3, 1840.

7.

Also an order, signed by L., as follows:

"WALNUT BLUFF, *9th January*, 1844.

"DEAR SIR: Please deliver to Dr. Rob't J. Ware, executor of David White, sixteen shares of Galveston stock, and oblige your friend,

"ABNER S. LIPSCOMB.

"To. Col. James Love."

8.

Also a paper purporting to be a receipt, not signed, but in Lipscomb's handwriting, as follows:

WALNUT BLUFF, TEXAS, *January* 9, 1844.

Received of Abner S. Lipscomb four shares of Galveston City stock and an order on James Love, Esq., of Galveston, for sixteen
137 shares more, which order, if paid, will make twenty shares of stock belonging to the estate of David White, deceased.

9.

A receipt in hands of Giddings as follows, to wit:

"Received of Messrs. D. White and Lipscomb sixteen shares of stock, at $1,500 per share, in payment, and $1,100 due over and above the stock.

"LEVI JONES, *Agent.*

"6th June, 1839."

10.

Also receipt from L. Jones to Lipscomb for fifteen shares on deposit for lots, twenty-third of April, 1839 (in hands of Giddings), for adjustment on the return of Lipscomb to the United States.

11.

Also, "I have received this day from A. S. Lipscomb thirty shares of Galveston City stock, which I promise to return to him whenever thereunto requested, value received.

"JAMES LOVE.

"March 4, 1842."

12.

Assignment of stock by Abner S. Lipscomb:

(Form and copy.)

"For value received I do hereby assign unto James Love all my right, title, and interest in and to fourteen (14) shares of the stock of the city of Galveston, Texas, on which has been paid one thousand dollars on each share.

"(Signed) ABNER S. LIPSCOMB.

"JOHN P. BORDEN, *Witness.*"

(Nos. from 280 to 293.)

UNITED STATES OF AMERICA,
Middle District of Alabama.

Deposition of Thomas J. Molton, a witness sworn on the 26th, 27th, 28th October, 1882, at Montgomery and in the county of Montgomery, under and by virtue of an agreement between the solicitors of both parties waiving commission, in a cause of equity, No. 155, pending in the United States circuit court at Galveston, Texas, for the eastern district of said State, between Asenath A. Ware *et als.*, plaintiffs, and The Galveston City Co., defendant.

The said THOMAS J. MOLTON, being first duly sworn to speak the truth, the whole truth, and nothing but the truth, doth depose and say as follows:

138 *Cross-Interrogatories to Thomas J. Molton,*

A witness to be examined on behalf of the complainants in the case of Asenath A. Ware and others against The Galveston City Company, in the circuit court of the United States for the eastern district of Texas, at Galveston, in equity, No. 155.

First cross-interrogatory. Are your answers to each and all of the direct interrogatories made from your own personal knowledge of the facts stated by you, or are not some of said answers stated on information from others? If the latter, please to distinguish and

specify precisely to what extent each of said answers and what part thereof is given on information of others.

First answer. To the first cross-interrogatory he saith: My answers to the direct interrogatories are made from personal knowledge of the facts stated, in some instances, and in others, as I have explained, they were from information derived from correspondence, papers, and records and the necessary inferences therefrom, which writings made me certain of the facts, and in no case are said answers made from hearsay.

Second cross-interrogatory. If you have stated the time of the death of said David and Mary S. White or either of them, how do you know the truth of the matter so stated by you? Was the statement on your personal knowledge of the fact? Were you not, in the year 1869, ignorant of the date of the death of David White; also that of the death of Mary S. White? Have you arrived at any statement of the date of such death or deaths otherwise than by information from some other person or persons, and what persons, and when communicated to you?

Second answer. To the second cross-interrogatory he saith: I know the truth of my statement of the time David and Mary S. White died by inquiry and by general knowledge of and especial intimacy with my wife's family history, and I well remember personally the winter and fall they are respectively stated to have died. I don't recollect whether in 1869 I was ignorant of the exact day of the decease of David White or Mary S. White; but, if so, it was from the absence of data from which to refresh my recollection or want of time for the moment to recall to mind the date of same. I don't remember the various persons whom I have heard speak of the particular dates of their death nor the occasions, but frequently have heard said dates given by the complainants in this suit and other relatives. I have also seen their deaths in the family Bible.

Third cross-interrogatory. If you have stated the age of the several complainants or any of them at any time, was each of such statements made on your personal knowledge of the fact stated by you, or was it made on information from other person or persons? Answer as to each person.

Third answer. To the third cross-interrogatory he saith: In my statement of the ages of the several complainants I derived
139 my knowledge from the same sources as to the deaths in the answer to preceding interrogatory, except that additionally in the case of their ages I have at sundry times heard each one of them state how old he or she was, and have seen the family Bible in which most of their ages are recorded.

Fourth cross-interrogatory. At what date were you married? Are you related to any of the complainants otherwise than by such marriage?

Fourth answer. To the fourth cross-interrogatory he saith: I was married the twenty-third day of December, 1852, and am not related to any of the complainants except by marriage.

Fifth cross-interrogatory. Did David White leave a will which

was admitted to probate and recorded in the State of Alabama? If so, state in what county it was so probated and recorded.

Fifth answer. To the fifth cross-interrogatory he saith: David White left a will, which was probated and recorded in the State of Alabama, in the county of Montgomery (under a special act of the legislature), giving the orphans' court thereof jurisdiction of the same.

Sixth cross-interrogatory. Has a certified copy of said will ever been in your possession? Please obtain and make part of your deposition a properly certified copy of said will and of the probate thereof. Is it or not within your power to obtain the same? If you fail to annex the same to your deposition, state your grounds for such refusal.

Sixth answer. To the sixth cross-interrogatory he saith: A certified copy of said will and of the probate of same was in my possession at one time, procured at my personal expense and forwarded in the spring of 1869, at their request, to Ballinger, Jack & Mott, together with a large package of other papers (179½ pages altogether), bearing upon the stock involved in this suit and other matters of White's estate, and the receipt whereof they acknowledged and most of which, including the copy of the will, were never returned to me, though requested. It is not, therefore, in my power to obtain a certified transcript, except by another draft on my individual purse, which I don't consider it the right of defendant to demand.

Seventh cross-interrogatory. Annex also to your deposition a correct or duly certified transcript of all the proceedings in the administration of the estate of David White, deceased, and if you fail to do it state your grounds therefor.

Seventh answer. To the seventh cross-interrogatory he saith: I have the same answer to make to this interrogatory as to a correct and certified copy of the proceedings in the administration of the estate of David White which was included in said package of papers so expressed to Ballinger, Jack & Mott and not returned.

Eighth cross-interrogatory. Did Mary S. White leave a will which was admitted to probate and recorded in the State of Alabama? If so, state in what county it was so probated and recorded.

Eighth answer. To the eighth cross-interrogatory he saith: Mary S. White left a will, probated and recorded in Mobile county, Alabama.

140 Ninth cross-interrogatory. Has a certified copy of said will ever been in your possession? Please obtain and make part of your deposition a properly certified copy of said will of Mary S. White and of the probate thereof. Is it not within your power to obtain the same? If you fail to annex the same to your deposition state your grounds therefor.

Ninth answer. To the ninth cross-interrogatory he saith: A certified copy of the same was once in my possession, and in 1869 was sent in the package of papers above alluded to (in answer to fifth interrogatory), which is among the writings still withheld from deponent; and the same reasons are given for failure to forward another copy thereof.

Tenth cross-interrogatory. Annex also to your deposition a correct or duly certified transcript of all the proceedings in the administration of the estate of said Mary S. White, deceased; and if you fail to do it, state the grounds therefor.

Tenth answer. To the tenth cross-interrogatory he saith: I would annex a copy of the proceedings in the administration of Mary S. White's estate but for similar reasons that, because of the retention of the copy forwarded to them in 1869 and not returned, I could not obtain a certified copy without having to pay for same.

Eleventh cross-interrogatory. Who was appointed by the will of David White executors thereof or its executor? If more than one was appointed, did both qualify and act as such, or who acted as such executor?

Eleventh answer. To the eleventh cross-interrogatory he saith: Robert J. Ware and Mary S. White were appointed executors of the will of David White, but the former alone qualified and acted as executor.

Twelfth cross-interrogatory. Was not Robert J. Ware appointed and did he not act as executor of the will of David White? How was he related to David White? What were the means, character, and standing of Robert J. Ware? Was he or not a man of wealth, intelligence, and business ability and influence? Or state the facts in regard to these inquiries.

Twelfth answer. To the twelfth cross-interrogatory he saith: Robert J. Ware, the acting executor, was the son-in-law of David White. The means of R. J. Ware were ample, his character good, and standing respectable. He was also a man of intelligence, business ability, and influence.

Thirteenth cross-interrogatory. Was the estate of David White a solvent estate; did it pay all debts and liabilities in full; did it not owe a very large amount of money to said Robert J. Ware, which was never paid? And state the amount, or, if not able to state such amount, state all facts within your knowledge and information tending to show fully and fairly the condition of the estate of David White as respects indebtedness or liabilities to Robert J. Ware. Have you answered fully to your best judgment and information on that subject?

141 Thirteenth answer. To the thirteenth cross-interrogatory he saith: The estate of David White was largely solvent and paid its debts in full. By a partial settlement in probate court of Montgomery county, Alabama, I had the impression that his estate was indebted to R. J. Ware in the sum of forty-odd thousand dollars, but a later examination of the records of the chancery court showed me that said indebtedness had all been settled under a regular decree.

Fourteenth cross-interrogatory. Did David White die intestate?

Fourteenth answer. To the fourteenth cross-interrogatory he saith: David White left a will, dying testate.

Fifteenth cross-interrogatory. Did David White die intestate as to any estate, property, or right owned by him at his death? And

state the parts or clauses of his will on which your answer is founded.

Fifteenth answer. To the fifteenth cross-interrogatory he saith: David White, after disposing specifically in the body of his will of his slaves and much other property, made disposition in the residuary clause of the rest and residue, mentioning therein lands, scrip, notes, and other things, but not the interest or claim in or to the stock matter in Texas.

Sixteenth cross-interrogatory. Did Mary S. White die intestate?

Sixteenth answer. To the sixteenth cross-interrogatory he saith: Mary S. White also left a will, dying testate.

Eighteenth cross-interrogatory. Did Mary S. White die intestate as to any estate, property, or rights owned by her at her death? And state the parts or clauses of her will on which your answer is founded.

Eighteenth answer. To the eighteenth cross-interrogatory he saith: (There being an omission of the seventeenth interrogatory, witness proceeds to answer this the eighteenth.) The same answer given to the question in the fifteenth interrogatory as to David White's intestacy as to any estate, property, or rights is applicable to Mary S. White, except that in her case she made testamentary disposition of certain Texas interests in different parts of her will, but failed to mention anything about the Galveston stock matter or any interest or claim in or against the City Company.

Nineteenth cross-interrogatory. Have you any, and what, connection with the institution and prosecution of this suit as lawyer or attorney or agent or employee, or in any, and what, other capacity; and have you any interest in the result thereof, direct or contingent? And state the entire amount and extent of such interest. Have you answered fully and fairly?

Nineteenth answer. To the nineteenth cross-interrogatory he saith: I have connection with the institution and prosecution of this suit as agent for the complainants, being mainly instrumental in getting up the facts and furnishing data therefor, to many of which I had access through the papers of my father-in-law, Dr. Robert J. Ware. I have no interest in the result of said suit farther than the natural solicitude I feel for my mother-in-law and other relations of my wife, to succeed in recovering rights I believe them honestly entitled to. I have answered fully and fairly.

142 Twentieth cross-interrogatory. Who are the parties connected with the institution and prosecution of this suit as attorneys, solicitors, counsel, or agent? State their names. Have you stated all so connected? Who employed them severally? What is the agreement or understanding as to compensation or fee to each? State fully. Who is to advance or pay the costs of the litigation?

Twentieth answer. To the twentieth cross-interrogatory he saith: All the parties connected with this suit in its institution and prosecution are Joseph R. Coryell, of Galveston, Texas, as agent, and Mann & Baker, M. C. McLemore, and Gresham & Jones, of the same place, as solicitors and counsel. Said Coryell, who is a land agent, was originally employed by the several complainants on a contin-

gent interest of one-half, and he employed the above-mentioned three legal firms under some arrangement as to compensation between themselves, it being understood with Mr. Coryell that the complainants would have no interest in whom he engaged as counsel, except that he should select such as would be able and satisfactory. He was to arrange for their fees, cash or contingent. I have answered fully. As to the court costs, the lands of the complainants in Archer county, Texas, have been set apart for their payment.

Twenty-first cross-interrogatory. You are asked in the direct interrogatories whether you have read the bill and answer. Did you say you had read them? The bill alleges in substance that the complainants named, except Holtzclaw, husband of Mrs. Holtzclaw, took whatever interest David and Mary S. White had in the stock sued for by descent, as heirs-at-law of said David and Mary S. White. Is it true that said complainants did so take by descent? Is it true that said David White and Mary S. White or either, and which one, of them died intestate?

Twenty-first answer. To the twenty-first cross-interrogatory he saith: I have read the bill and answer. The interests that the complainants, except Holtzclaw, took under David and Mary S. White in the stock sued for was by descent as heirs-at-law of said Whites or by their wills, according to the legal construction that different attorneys would put upon the matter. I have answered that David and Mary S. White died testate.

Twenty-second cross-interrogatory. The fifth direct interrogatory asks you the diligence used by the "legal representatives" of the estate of David White, deceased, or the heirs of David White, deceased, from the death of David White to the beginning of this suit. What party or parties do you understand to have been the "legal representatives" of said estate since the death of said White? Give name or names, with the facts on which you base your answer.

Twenty-second answer. To the twenty-second cross-interrogatory he saith: The parties I understand as the legal repreesentatives of David White are R. J. Ware, his executor, and any agents and attorneys representing him as such (which names I have already given in answer to the fifth direct interrogatory), as also the facts on which my answer is based, and Thomas J. Molton, the deponent.

143 Twenty-third cross-interrogatory. If you have answered direct interrogatories as to any acts by Robert J. Ware or anything done with respect to him by any other person or any information obtained by him, please to state whether your entire answers and statements of those matters were of your own personal knowledge, and state how it was that you happened to have such personal knowledge; and if any of said answers, in whole or in part, were based on information from any other source than your own personal knowledge, then give such source of information fully and precisely, stating the names and dates, if from any person or persons, and if from writing, letters, records, or other written sources,

then indicate the same fully, it not being admitted hereby, but specially objected, that all answers not of personal knowledge are not competent evidence.

Have you in your answer to this interrogatory fully and correctly distinguished and discriminated as to matters within your personal knowledge and those not within your personal knowledge?

Twenty-third answer. To the twenty-third cross-interrogatory he saith: My statements in answer to direct interrogatories as to any act or thing done or information obtained by Robert J. Ware or any person or persons for him are derived from letters and other writings and papers, of dates and from persons already indicated, and the necessary inferences therefrom.

Twenty-fourth cross-interrogatory. If in your answer to direct interrogatories you have spoken of any information received by said Ware from the Galveston City Company or any office or agent thereof, or from Abner S. Lipscomb, or from any other source, relative to the action of said Lipscomb as to stock of the Galveston City Company, please to state whether, to the best of your knowledge and belief, you have given and stated the whole of such information and facts received from any of said parties, or whether you have with-eld any of it whatever, and state why so with-eld.

Twenty-fourth answer. To the twenty-fourth cross-interrogatory he saith: In any information spoken of by deponent as having been received by R. J. Ware from the Galveston City Company or its agents, Borden and Cole, or from Dr. Billingslea or A. S. Lipscomb, or from any other source, in regard to actions of said Lipscomb as to stock of the Galveston City Company, I have not withheld any information or facts received from said parties, but have stated them fully.

Twenty-fifth cross-interrogatory. At the time of the death of David White did he not have a large unsettled account with the Republic of Texas as agent of said Republic for the receipt of money of the State; also for sale of certificates or scrip for land? Who were the parties who acted as representatives of David White's estate and as attorneys or agents in settling and closing up said account? When was it done? How was it done? Was it not by payment in Texas money, then at a less rate than ten for one of said money, or some other, and what, rate? What connection had Abner S. Lipscomb therewith? What connection had Barry Gillaspie?

144 Was not said Gillaspie the law partner of said Lipscomb?

Have you not possession of or subject to your control any papers bearing upon the answer to this question? If so, annex same to your deposition or state why you do not.

Twenty-fifth answer. To the twenty-fifth cross-interrogatory he saith: At the time of his death it appears from my former reading of letters that there was an unsettled account between David White and the Republic of Texas through his agency for said Republic in selling certificates and scrip for land, to settle up which account deponent has seen some letters or papers from Judge Lipscomb and Barry Gillaspie (who at one time, I think, were law partners) that purported to be part of a mutual correspondence with Dr. Ware, but

at what particular date and at what discount and how much settlement had I am not positive. The papers bearing upon this subject are neither in the possession of the deponent.

Twenty-sixth cross-interrogatory: At the time of the death of said David White was there or not an unsettled account between him and M. B. Menard, in which a considerable balance of money was claimed as owing by Menard? You are not asked the particulars, but as to the fact. What representative of the estate of David White took charge of or looked after said claim, and what lawyer or attorneys? And give dates and periods of time.

Twenty-sixth answer. To the twenty-sixth cross-interrogatory he saith: At the time of the death of White there was an unsettled account between him and Micheal B. Menard, in which a large balance of money was claimed as due from Menard. From letters once seen it seems that R. J. Ware attempted to look after said claim and employed attorneys therefor at dates not recollected.

Twenty-seventh cross-interrogatory. Was not administration opened in Texas on the estate of David White, deceased? When, where, and the administrator? Was not such administration caused by the legal representatives of the estate of said White in Alabama? Was it not caused in whole or part by said Robert J. Ware?

Twenty-seventh answer. To the twenty-seventh cross-interrogatory he saith: Administration on the White estate was opened in Texas by one Lipscomb (William B., I think), date and place unremembered, and don't know at whose instance he was appointed.

Twenty-eighth cross-interrogatory. Was not suit brought in Texas by said Texas administrator of the estate of David White against M. B. Menard and against Levi Jones for the recovery of the amount claimed to be owing and for injunction against sale of any of the Galveston city league and labor of land? If not, state the nature and object of said suit, and give the date and pendency of said suit. Had not said Robert J. Ware some and what agency or connection with said suit or with causing institution thereof? Have you not possession of or subject to your control any papers bearing upon the answer to this question? If so, annex the same to your deposition or state why you do not.

Twenty-eighth answer. To the twenty-eighth cross-inter-
145 rogatory he saith: Suit was brought in Texas by said Lipscomb, administrator, against Menard and Levi Jones for recovery of some claimed amount, the date and pendency whereof and Robert J. Ware's connection wherewith or agency in the institution of which deponent cannot now state, the papers in connection with said suit being in the hands of the attorneys of present complainants in a suit that they have brought, and which is pending in the Supreme Court of the United States, against the Galveston City Company for $14,450 and interest, which it has never repaid to White's estate or heirs or any representative or agent of either and still owes, the company having formally acknowledged itself liable for. As to the nature and object of the suit against Menard and Jones, it seems it was brought against them because Menard, though agent only, had acted as principal, as we now know, and just before

the suit was dismissed the formal action of the company on Menard's memorial (as its minutes will show) discloses this and acknowledges the balance of $14,450 to be the debt of the company, Jones answering that he had sold the land.

Twenty-ninth cross-interrogatory. Did not the said Robert J. Ware visit Texas in the latter part of the year 1843 or early part of the year 1844, and was not an object of his visit to Texas, in whole or in part, connected with the claim of said White's estate growing out of the Galveston City Company stock of said White? Did he make any subsequent visit to Texas on like business? Are there not or have there not been in your possession or control papers bearing upon a correct answer to this question and enabling you to make answer thereto? If the fact as to such visit to Texas is not otherwise known to you, is not his widow your mother-in-law and his daughter your wife? Please to make inquiry of said Mrs. Ware as to the fact of such visit to Texas and state her answer thereto and state whether you have done so, and, if not, why so.

Twenty-ninth answer. To the twenty-ninth cross-interrogatory he saith: Robert J. Ware visited Texas the last of 1843 or first of 1844, the object of his visit being partly to look into all matters in which the estate of White was interested, including the condition of the stock in the Galveston City Company of said White. He also made a subsequent visit to Texas in the spring of 1858, having partly in view similar business. I have seen papers enabling me to make this correct answer to this interrogatory.. I have inquired of Mrs. Ware, my mother-in-law, who replies that the same was partially his business on both of said trips.

Thirtieth cross-interrogatory. Who was Dr. Clement Billingslea? Was he in any and what manner related to David White or his wife or any of his family or to Robert J. Ware? Did he have any and what connection in business or lands in Texas with David White or Robert J. Ware? Is he living or dead? If the latter, when did he die? Where did he reside, and where does he now reside, if living?

Thirtieth answer. To the thirtieth cross-interrogatory he saith:

146 Dr. Clement Billingslea was a practicing physician and planter in Montgomery county, Alabama, and a nephew of Mary S. White and a cousin of Mrs. Ware. He was interested, with Robert J. Ware and, I think, David White, in lands bought in Texas. He died about ten years ago in Marion, Perry county, Alabama, the then place of his residence.

Thirty-first cross-interrogatory. Were you not present in the city of Galveston on about the — day of August last, before C. Dart, the examiner who was engaged in taking testimony in this case, when a letter or communication addressed by G. Borden, Jr., to Dr. Clement Billingslea, giving a statement with subject to the stock in the Galveston City Company issued to David White, was proved by Judge J. P. Cole, the present agent of said company, to be in the handwriting of said Borden, and that at its date said Borden was agent of the said company, and said letter or communication was filed by complainants' counsel as Exhibit A, annexed to the deposi-

tion of said Cole? Did you not hand or deliver said letter from said Borden to said Billingslea to the complainants' counsel at the time it was exhibited to and proved by the said witness, Cole? If not, please state from whose custody said letter was produced. Please state when said letter first was seen by you, and also state when it first came into your possession, and state from whom, where, and how you obtained it.

Thirty-first answer. To the thirty-first cross-interrogatory he saith: At the time and on the occasion referred to in this interrogatory I was present and handed to complainants' counsel the letter or statement alluded to from Gail Borden, Jr., former agent of the company, and shown to and proved by James P. Cole, present agent, as the genuine production of said Borden and filed by said counsel as Exhibit A to Cole's deposition. Said letter was first seen and came into my possession from the papers of Dr. Ware about the time I went first to Galveston for White's estate, and obtained by me from the executor of said Ware.

Thirty-second cross-interrogatory. From your acquaintance with said Billingslea and his connection with the estate of David White or parties having interest therein or connection therewith, please to state all facts in your knowledge tending to show what caused said Billingslea to write a letter to said Borden on the 24th May, 1843 (to which the above letter of said Borden purports to be a reply), making inquiry in regard to the David White stock in the said Galveston City Company and tending to show at whose instance or request, in whose behalf, and for whose use, benefit, or information in regard to said stock said Billingslea so made inquiry. Does not said letter show personal acquaintance between said Billingslea and said Borden? Is it not your opinion that said letter was written at the request of and to obtain information for Robert J. Ware, Mrs. White, widow of David White, or some other, and what, parties interested in the estate of said White? State all the facts on which whatever opinion you entertain on the matter is founded.

Thirty-second answer. To the thirty-second cross-interrog-
147 atory he saith: From letters from Dr. Billingslea to Dr. Ware and the sending of the former by the latter to Texas with a power of attorney to transact any business of interest to the White estate, I draw the inference that the letter of Billingslea of May 24th, 1843 (to which Gail Borden's letter seems to be a reply), inquiring about the David White stock in the Galveston City Company was at the instance of Dr. Ware, who was executor of White, and for his benefit as such executor, in regard to said stock said letter showed personal acquaintance between Billingslea and Borden.

Thirty-third cross-interrogatory. State all facts in your knowledge tending to show to whom said Billingslea delivered said letter and at how early a date after its receipt by him, and especially all facts tending to show whether it was not delivered by him to Robert J. Ware, and when, and how long it had been in the possession or control of said Ware.

Thirty-third answer. To the thirty-third cross-interrogatory he saith: I am satisfied from my acquaintance with letters read from Billingslea that he delivered said letter from Borden to Dr. Ware at a very early day and soon after its reception by said Billingslea.

Thirty-fourth cross-interrogatory. Did Robert J. Ware leave a will? When did he die? Who have been the executors thereof and administrators of his estate? What interest had your wife under his will or in his estate? Have you not had full opportunities of access to all matters and papers connected with his estate? If not, state the facts in regard to the nature of such access as you have had. Did you or not possess his confidence in regard to his affairs or to business matters, and how long had you had intimate acquaintance or association with him?

Thirty-fourth answer. To the thirty-fourth cross-interrogatory he saith: Robert J. Ware died the first day of November, 1867, leaving a will, of which Robert Y. Ware and James H. Ware are named as executors, but only the former qualified and acted; and H. M. Trueheart, of Galveston, was his administrator in Texas. My wife's interest under his will was a child's part, there being three children, and the widow having also a child's portion of the surplus of property after her first getting more than an equal share. I have sought full access to his papers, but have not obtained the same to my entire satisfaction, from the indifference of those having more authority. Deponent possessed the confidence of R. J. Ware in matters generally, but in his business transactions (which were very large) he acted upon the principle that "secrecy was the soul of business." My acquaintance with him was from my early childhood, say from seven years of age, and intimate social relation from the time of my marriage with his daughter, in 1852, until his decease, in 1867.

Thirty-fifth cross-interrogatory. Did not said Ware, in behalf of the estate of David White, set up or assert some claim against Abner S. Lipscomb in the lifetime of the latter and soon after said White's death, growing out of transactions or dealings between said
148 White and Lipscomb and growing out of Galveston City Company stock? If so, at what date was claim against Lipscomb first made and how long was it continued? Were any attorneys or agents employed in Texas by said Ware in connection with any claim as against said Lipscomb? If so, state the attorney or attorneys so employed and when. This inquiry is made only as to the fact of the existence of such claim, and the witness will in this, as in all other cross-interrogatories, make answer only as to the exact inquiry; and the witness will also give in his answer the sources of information on which said answer is based, whether on personal knowledge or from documentary evidence; if the latter, exhibiting the same, and defendant reserves all right of objection to the sufficiency of the answer in evidence.

Thirty-fifth answer. To the thirty-fifth cross-interrogatory he saith: R. J. Ware did set up claim against A. S. Lipscomb, and to attempt to obtain settlement of his agency for David White and business for his estate he sent Dr. Clement Billingslea to Texas in the winter of 1842–'43, but whether or to what extent and at what

time he asserted said claim or what exactly or substantially he caused to be done concerning the same deponent does not recall, not having charged his memory therewith, for the reason that in all of his inquiries, including those from Ballinger, Jack and Mott, my then attorneys, concerning the financial standing of Lipscomb's estate, he was informed that it was largely insolvent, said Lipscomb having been of reputed poverty in Alabama and having written back in one of his letters to Mr. White that his friends need have no fears of losing by him, as, though broken to pieces, he had determined to rebuild his fortune in Texas.

Thirty-sixth cross-interrogatory. From the course of the examination in this cause by complainants' counsel and statements by them, it is understood that the witness is expected to give his version of transactions between witness and the counsel for defendants; and the witness is therefore asked, if you have spoken of any transactions or relations with Ballinger, Jack and Mott or any of them, please to state on whose behalf, in what character, representing what right, you applied to said Ballinger, Jack and Mott. Was it not in behalf of the estate of Robert J. Ware, deceased, or of the executor thereof?

Please examine the paper annexed hereto, marked Exhibit No. 1, and state in whose handwriting it is and whether your name is not signed thereto and your signature genuine.

Thirty-sixth answer. To the thirty-sixth cross-interrogatory he saith: In my relations and transactions had with Ballinger, Jack & Mott in 1869 and afterwards, spoken — in my answer to fifth direct interrogatory, I applied mainly in behalf of the heirs of White in the character of agent and administrator of his estate and representing their rights. I also was representing the estate of R. J. Ware, for which said firm was before employed in some matters. I have looked at Exhibit 1, attached to these cross-interrogatories, and it is in the handwriting of James T. Holtzclaw, of Montgomery, Alabama, and has my genuine signature.

149 Thirty-seventh cross-interrogatory. Is not the following statement true and correct, in substance and fact, that in the spring of 1869 you came to Galveston for the purpose of recovering or realizing the benefit of such of the thirty-two lots which were obtained by Lipscomb and White from the Galveston City Company in August, 1839, for the surrender of shares of the company stocks as had not been disposed of by said Lipscomb or could be obtained in behalf of the estate of Robert J. Ware, deceased, claiming the same for said estate adversely to any heir of David White, unless it was Mrs. Ware, widow of said Robert J. Ware? And was it not true that the open and public record facts as to said lots were that the Galveston City Company had conveyed them by deed, duly recorded many years previously, to Levi Jones; that said Jones, by like deed recorded many years previously, had conveyed them to said Lipscomb, and that in order to show the right and title asserted and represented by you, and to aid which attorneys were employed, it was necessary to go back to the stock in the company surrendered for said lots to the company and to the certificate of purchase given

by said company in the name of White and Lipscomb, and also to show and satisfy all purchasers that the interest of all persons having any rights under the wills of David White and Mary S. White therein had been conveyed to said Robert J. Ware, except that of his said widow? Was not this the basis—the theory of claims and facts on which said attorneys were employed and are expected to establish in court and to aid in procuring the sale of said lots to whoever could be induced to purchase them and of the truth of which all persons negotiating or seeking to purchase any of said lots were expected to be informed and to become satisfied? If this is not in substance and outline correct, state wherein it is erroneous. And is it not further true in substance and fact that at or about the same time you consulted said attorneys with respect to whether a claim could be made against the Galveston City Company in behalf of the estate of said Ware as owner of all interest or right therein under David or Mary S. White, unless it was the interest of Mrs. Ware, growing out of the shares of stock in said company which had been originally issued to David White? Was not the foundation of said claim as submitted to said attorneys the recognized and admitted facts by the said company contained in the statements by Borden to Billingslea and by J. P. Cole, agent of the City Company in 1854, which has been proved in this case as Exhibits A and B in connection with the evidence of said J. P. Cole, and a suspicious conjecture or belief that a portion of said stock had been illegally transferred by said Lipscomb after the death of said White, and that the claim against the company was for such stock so supposed to have been illegally transferred? Did you not on this subject principally confer with said Ballinger and discuss the matter with him? And did not said attorneys, so far as any of them expressed opinion, and especially said Ballinger, state to you in substance that his belief was that no valid claim existed against the company; that it was barred by limitation and lapse of time, even as to such stock as was transferred subsequent to White's death, if any, but that a suit was pending in the supreme court of the State of Texas on behalf of a party claiming to hold a valid share of stock, but which share had been repudiated and disowned by the company and another share of stock substituted in its place from about the period of the incorporation of the company; that in this suit the said attorneys were of the counsel in behalf of the Galveston City Company and were seeking to maintain the bar against the stock, and sanguine of success; if they should be disappointed, however, and in this suit the supreme court should hold the doctrine contended for in behalf of the party suing that no limitation or laches could run against the once valid holder of stock in the company, or decided principles differing from the views of the law entertained by said Ballinger, they would then advise said Molton as to whether they thought a suit could be maintained against the company and would in the meantime endeavor to ascertain the facts in regard to the transfer of the stock and whether subsequent to the death of White; that it was well understood by them at the time that the City Company would not permit the ex-

amination of its books, and that an examination of the agent of the company in a suit then pending, which had been brought for one of the lots so claimed by said Molton for said Ware's estate, was the means suggested by said attorneys of obtaining said information? Did the said attorneys ever undertake to do more as respect- said stock than of the developments before spoken of came to pass, namely, they were able to ascertain the illegal transfer of any of the stock, and such decision by the supreme court as changed their views with respect to the bar by limitation and lapse of time, then to advise as to a course of action for or growing out of said stock? If the above statement is not substantially correct state wherein you consider the same incorrect.

Thirty-seventh answer. To the thirty-seventh cross-interrogatory he saith: To the thirty-seventh cross-interrogatory, as to whether a certain long-detailed statement is correct in substance and in fact, deponent makes the following answer as his recollection of the actual history of matters as they occurred, to wit: In April, 1869, I arrived in Galveston and applied to Ballinger, Jack & Mott in the double capacity of representing the estates of David and Mary S. White in all their interest whatever in Texas and the estate of R. J. Ware in any interest it might have in said State, having authority from the heirs of the two former estates, the same persons being heirs of both, and having had myself appointed administrator *de bones non* of David White's estate with a view to give me more authority in the inquiry and having also interest in the estate of R. J. Ware by virtue of my wife's share therein. After consulting said firm and exhibiting our papers in estates of White and Ware and investigating the facts in reference thereto I employed them to represent all of these heirs, or those of them legally entitled, in clearing the title to such of the thirty-two lots in Galveston obtained by
151 Lipscomb and White from the Galveston City Company for the surrender of shares of the White stock as had not been disposed of by Lipscomb and which lots the company had conveyed to Levi Jones and he to Lipscomb and which, therefore, necessarily involved a reference to the original White stock surrendered to the company for said lots, and to represent them in any claim to lands in Texas that had been originally owned by White or Ware or to which either had a right, to which lands there were then adverse claimants as purchasers at tax sales and otherwise, and also and particularly to ferret out the question as to whether all the David White shares of stock in the Galveston City Company had been legally disposed of and transferred and sold by Lipscomb, his attorney-in-fact, and to assert, in legal proceedings, against the Galveston City Company their right to such stock originally issued to D. White as was not lawfully divested out of him and his estate and for which they had received no consideration. It appearing in the investigation that some of the heirs of White had transferred their interest in his estate and that of his wife and widow to R. J. Ware, the said Ballinger, Jack & Mott were to assert the claim to the lots and lands in whoseever names they considered best entitled under the law and all the facts and papers of case, and afterwards to satisfy pur-

chasers of the same to the superiority of their title to that of any and all claimants. These are the true basis and correct theory on which said attorneys were employed. They were consulted, and especially Judge Ballinger, with regard to the proper parties for the stock suit to be brought in the name of, and his opinion, as expressed, was that he would probably decide to assert the claim in the names of the heirs of the Whites, as he doubted whether the transfers made by some of them to R. J. Ware would carry their interests in the stock, if anything at all, Dr. Ware being at the time executor of White, and the stock not in sight and therefore not in the contemplation of the parties making the transfers and the consideration entirely disproportional to the probable value of the recovery.

We had before us looking into this stock claim the statements by Borden to Billingslea in 1843, and by J. P. Cole in 1854, alleging that all the White shares had been duly transferred, and also the apparently conflicting statement by A. S. Lipscomb, more than two years after White's death, that there were still on hand 21 shares belonging to estate of David White, and many other papers, which, all construed together, gave us a suspicion that there might be something wrong in the transfers and disposition of a portion of the stock. The said attorneys, Ballinger and Jack principally, expressed themselves of the belief that a large number of the shares were not, in fact, transferred until after the death of White, which they said was illegal, and that the company would be held responsible, and on the principle of "wrong in one thing wrong in all" they expected to find the company was also largely indebted otherwise to White's heirs; and, notwithstanding the resolution of its directory, sealing their books against inspection, they would open them
152 and probe our matter to the bottom if it required the *posse comitatus* of the whole of Galveston county; that, though there had been great lapse of time, it would not prove a practical difficulty, as the circumstances would, no doubt, take this case out of the ordinary operation of the statute of limitation, and the correspondence with Dr. Ware, and other papers, would sufficiently explain what otherwise might be construed as laches.

They did allude to a case of theirs before their supreme court in which they were representing the company in trying to uphold the bar against the stock; and while they would work vigorously to maintain the bar in that case, they would, in our suit, with equal energy, insist upon a contrary ruling as proper on account of the different circumstances surrounding the two cases; they also suggested that they would use a suit then depending for obtaining the information they desired concerning the transfers of White's stock, by examination of the agent of the company. In their correspondence afterwards, in accounting for what otherwise might seem inexcusable delay in bringing the suit, they several times (as will be seen by reference to their letters annexed to the direct interrogatories as exhibits) mentioned the case first above alluded to as not yet decided, and spoke of it as being similar in principle to ours. I was relying upon Ballinger's substantial statement that the suit they alluded to was a "white-horse" case with ours. It was not until

many years afterwards, in reading the decision of the supreme court of Texas in the case of one Scott, of Memphis, against the company (which I found to be the case they had referred to), that it differed very materially from ours and had no bearing thereon, the court deciding that Scott had no share of stock in the company. The answer suggested by the questions in this interrogatory, or any other not in substantial compliance with the statement detailed above by the deponent, would be at variance with the facts, as I remember them, and is therefore denied.

Thirty-eighth cross-interrogatory. What lots in the city of Galveston, of those originally obtained from the Galveston City Company by White and Lipscomb, were claimed in 1869 and thereafter as belonging to the estate of Robert J. Ware and his widow, and what lots were sold and the proceeds thereof remitted to the executor of said Ware in Alabama? State the lots and number thereof and the amount of such proceeds as nearly and approximately as you are able to do. Were not said attorneys, Ballinger, Jack & Mott, aiding or connected with said sales?

Thirty-eighth answer. To the thirty-eighth cross-interrogatory he saith: The lots in the city of Galveston, of those originally obtained from the City Company by White and Lipscomb in surrender of the David White stock, and claimed in 1869 and thereafter as belonging to the estate of Ware or White, according to the construction of law that should be put upon the papers by our attorneys, Ballinger, Jack & Mott, and which were afterwards sold, and proceeds, nearly $14,000 in currency, remitted to the executor of said Ware, in Alabama, were of the following numbers: Lots 8, 9,
153 10, 11, 12, 13, 14, in block 369; 8, 9, 10, and 11, in 371; 8 and 9, in 686, and lot 9, block 626; and Ballinger, Jack & Mott were connected with the sales of the same.

Thirty-ninth cross-interrogatory. At the time you were in Galveston in the spring of 1869, were not the above lots, in whole or part, claimed to belong to the estate of Judge Lipscomb? Is not the following a substantially correct extract from your letter to Ballinger, Jack — Mott, dated February, 1870: "When in Galveston last spring Col. McLemore informed me that his fee for claiming an undivided moiety of these lots of White's depended upon his success in recovery, and therefore if he could become satisfied by the paper I should leave with you that the claim of Lipscomb's estate was not a good one he would withdraw it, and also abandon all idea of intervening as to the undivided half of seven other lots."

Thirty-ninth answer. To the thirty-ninth cross-interrogatory he saith: At the time I was in Galveston in the spring of 1869 some of the above lots were claimed by Lipscomb's estate and the claim in part asserted in a suit then pending. The quotation from my letter is doubtlessly correct.

Fortieth cross-interrogatory. Are you not aware of the fact that suits were subsequently brought by the representatives of Judge Lipscomb's estate, and also by heirs of Lipscomb's first wife, claiming interest in the lots or some of them so sold for and proceeds remitted to estate of Robert J. Ware, deceased, and that Ballinger,

Jack & Mott were the attorneys to defend the title of the purchasers under said sale; and was not said suits the subject of a correspondence between you and said attorneys in December, in 1878?

Fortieth answer. To the fortieth cross-interrogatory he saith: Suits were subsequently brought by the representative of Lipscomb's estate and the heirs of Lipscomb's first wife, claiming some interest in some of the lots above mentioned, the proceeds whereof had been remitted to executor of Ware, in Alabama, and for which Ballinger, Jack & Mott (I understood) were attorneys to defend the title of the purchasers under said sales, and said suits were the subject of a single letter each between us in December, 1878.

Forty-first cross-interrogatory. Was there ever any professional relation on the part of said Ballinger, Jack & Mott, or any of them, with respect to a claim against the Galveston City Company growing out of its stock issued to David White, other than to endeavor to ascertain facts of the illegality of transfer of some of said stock, about which suspicion existed; upon which facts, if their views as to the law expressed to you in the spring of 1869 should be changed by the decision of the supreme court of the State in a case then pending before it or otherwise, they could advise that in their opinion a course of action existed against said company? If you say there was ever any other relation as respects claim for stock in said company, state it precisely, with your means of knowledge thereof.

Are not the following, in substance, correct extracts from your
154 letters written to said attorneys at the dates specified? May 11, 1870: "Has the legislature arranged for the organization of the new supreme court, and when will the first term commence? Any new light about our interest in the stock transaction?" Sept. 8, 1870: "If anything has occurred to throw new light upon the stock transaction, please state it; also whether the State court has decided the question about limitation, which involves the same principle that we are interested in." April 18, 1871: "Has the supreme court not yet decided the question upon the statute of limitation, which it was thought by W. Ballinger would have a large bearing in deciding whether our claim against the Galveston City Company will amount practically to anything?" March 14, 1871: "N. B.—State what you think of the claim *vs.* the Galveston City Company. Was the decision ever made by your supreme court upon the statute of limitation in a case that you thought would have an important bearing on our rights, and what was said decision?" March 7, 1872: "To W. P. Ballinger: Allow me to felicitate you upon your restored good health and to wish that it may be permanent. Mr. Trueheart said recently that your supreme court had not yet decided the case that you thought would have a bearing upon our claim against the Galveston City Company on account of the White stock transaction. Is there no intimation of what the decision will be? What, in your opinion, will they decide? Is it necessary that I should make a trip to Galveston any time this spring to see you about the claim above alluded to? In a word, do you think, all things considered, that it will ever amount practically to anything? If so, what would you advise in reference thereto?"

July 1, 1872: "To Ballinger, Jack & Mott: I wrote some two months since to your Wm. B., but I am charitable enough to charge Uncle Sam with all blame for default of answer. Your supreme court has had before it a long time a case involving the same question of limitation that the heirs of David White will have to meet *and* should they ever proceed against the Galveston City Company for an unauthorized transfer of stock. Has the court never yet decided the case? If so, affirmatively or otherwise?" The last two, being copied in full, are the only letters received from you during the year 1872. May 30, 1873: "On the sixth of July, 1872, I received my last letter from your W. Ballinger, giving an opinion that limitation was a bar to the claim of the heirs of David White against the Galveston City Company for stock improperly transferred to others on the company's books. He stated, however, that the supreme court, then in session, would decide a similar case upon the subject of limitation, which would go a long way towards settling the question in this claim. Has said court ever yet rendered a decision in said similar case, and was it in favor of the bar or against? If they settled that a bar was not completed, what would be your advice as to the best course to be pursued against the Galveston City Company in respect to our claims?" June 14, 1873 (referring to last above mentioned letter, to which answer had not been received):

"I also wanted to know whether a decision by your supreme
155 court had been made in the case that your Wm. Ballinger thought would have a large bearing in determining him whether to advise us to bring suit against the Galveston City Company, and was such decision favorable?"

Forty-first answer. To the forty-first cross-interrogatory he saith: With respect to a claim against the Galveston City Company growing out of its stock issued to David White, there was other professional relation on the part of Ballinger, Jack & Mott than the one described in this interrogatory, which has been already fully explained more than once in former parts of deponent's answer, together with my means of knowledge as to the same. The several extracts from my eight other letters written to said attorneys at the date specified are no doubt correct as quoted in those letters.

Forty-second cross-interrogatory. Did not said Ballinger, Jack & Mott, in the handwriting of said Ballinger, write to you on the seventeenth of June, 1873, a letter of several pages relating to the other business of Ware's estate, and from said letter the following is an extract, being all relating to the matter of the City Company stock: "The supreme court still holds up the case in regard to the Galveston City Company stock about which we wrote you. It is understood two of the judges are divided; a third, who is nearly blind, is in wretched health and gives little attention to the business he has to decide, but has not examined the case. Very careful and thorough examination of the subject satisfied us, without doubt, that the heirs of David White could not recover." On account of your writing to B., J. & M., knowing that you had not received the last referred to letter, was not a copy of it sent to you June 30, 1873, but the receipt of the letter of June 17, above copied from, was

acknowledged by you June 28, 1873, and did not that letter close all correspondence between Ballinger, Jack & Mott or any of them and yourself or any one else in behalf of Ware's estate, White, etc., so far as you know, relative to the matter of the stock of the Galveston City Company, until in December, 1878, Ballinger, Jack & Mott wrote to you for information and aid to defend the suits brought by Lipscomb's estate for lots, as referred to in the fortieth interrogatory?

Forty-second answer. To the forty-second cross-interrogatory he saith: The said Ballinger, Jack & Mott on the seventeenth of June, 1873, did write the letter described in this interrogatory, and afterwards sent a copy, thirtieth of June, 1873, and the receipt of letter of June 17, copied from in forty-first interrogatory, was acknowledged by me about the time stated—twenty-eighth of June, 1873. That letter did not close all correspondence between Ballinger, Jack & Mott and myself relative to the matter of the White stock in the Galveston City Company until the letter of December, 1878, concerning information to defend suit brought by Lipscomb's estate for lots referred to in the fortieth interrogatory, several letters having intervened on both sides between said twenty-eighth of June, 1873, and December, 1878, including one from W. P. Ballinger, for his firm, dated June 30, 1873, saying substantially that he had
156 mailed me a lot of briefs in some of their important cases before the supreme court, but that said briefs had no special bearing on the limitation question to which I had referred. I have in a book of other important matters a pencil memorandum, in my writing, concerning said letters in substantial conformity with the above description, and another letter from Ballinger, written from Austin or Tyler, where he said he was in attendance upon the supreme court, in which he explained the delay in commencing proceedings against the Galveston City Company, giving various reasons and excuses therefor and promising to begin suit whenever fully posted as to the estate of the company's responsibility, and that until he advised me differently I could take for granted they were pursuing the investigations into the stock transaction, and would move actively in legal proceedings for the White heirs as soon as practicable, but we must allow them to proceed in their own way and extend them confidence, and we would not in the interim suffer in our right of action. He also several times, besides, wrote other letters of the same general purport after June, 1873; and I also got several letters between that time and December, 1878, from Col. Jack, his partner, in Galveston, explaining delay and giving reasons therefor, and referring me particularly to their Mr. Ballinger, who he said was continuing the investigation of the David White stock transactions and would proceed against the Galveston City Company for the heirs in due time. I cannot find said last mentioned letters written to me between said dates after as diligent search as I have been capable of making in my present condition (having been quite unwell for the past month, which prevented an earlier answer to these interrogatories). If they should be found they will be produced on the trial for the inspection of the

court. I retained most of their letters up to the fall of 1873, when in removing to another residence in Montgomery I put all I came across into a book for safe keeping with my general papers, after which, in my seven or eight removals from place to place, I was not particular and mislaid much of my correspondence, including that from B., J. & M.

Forty-third cross-interrogatory. Is not the following a correct extract, in substance, *form* your letter to said B., J. & M., dated December 10, 1878: " Dr. Clement Billingslea, who went to Texas in 1842–'3 to bring about a settlement with Judge Lipscomb of the White matter, died several years ago in Marion, Alabama, well-nigh devoid of memory, and leaving no old papers "; if so, is that statement correct?

Forty-third answer. To the forty-third cross-interrogatory he saith: The extract you quote from my letter of December 10, 1878, is (I have no question) correct and the statement therein contained was true.

Forty-fourth cross-interrogatory. Are there any facts within your knowledge or of which you have any information *or* tending to show that whatever interest in all property in the State of Texas was devised to Mrs. Holtzclaw, one of the complainants, and to David P. Lumpkin, one of the complainants, by the will of
157 David White or the will of Mary S. White or inherited by them or any of them from said David and Mary S. White or either of them was at any time ever conveyed or belonged to Robert J. Ware or his estate or any representative thereof? Answer as to the interest of each of said parties. If you do know any such facts or fact state the same fully.

Forty-fourth answer. To the forty-fourth cross-interrogatory he saith: There were in 1869 some papers purporting to be transfers to R. J. Ware by David P. Lumpkin and Mary A. Holtzclaw (and her husband, James T. Holtzclaw), and shortly afterwards another such transfer found among Dr. Ware's documents from Thomas W. Cowles—three of the complainants—of their interests respectively in the estates of David and Mary S. White, of which three papers I left or sent to B., J. & M. transcripts from the records of probate court of Montgomery county, Alabama, and the originals I have not seen for several years, the same having been misplaced or lost. These are the three transfers described in my answer to thirty-seventh cross-interrogatory as those on which Judge Ballinger gave the opinion that if they conveyed any interest at all, Dr. Ware being executor of White and the consideration nominal, they would not in legal construction include the Galveston City Company stock interest, the same being at the time of said transfers unascertained and unknown to the heirs of White and not in the eye of the parties to the transfers.

Forty-fifth cross-interrogatory. Have you stated that you do not know any such fact or facts as referred to in the last preceding interrogatory?

Forty-fifth answer. To the forty-fifth cross-interrogatory he saith:

I have said that I know the facts stated in this interrogatory, modified by any explanation thereof, in answer to last interrogatory.

Forty-sixth cross-interrogatory. Is administration on the estate of David White in Mobile, Alabama, finally closed; and, if so, when was it closed, or is the same still unclosed and open? Who is the administrator thereof?

Forty-sixth answer. To the forty-sixth cross-interrogatory he saith: Administration on the estate of White in Montgomery county, Alabama (Mobile county probate court not having taken jurisdiction of this will, it has been finally closed for a long time; precise date not recollected). The administration of the estate having been removed from the Montgomery probate to the chancery court, when after long proceedings it was settled. There is now no administrator.

Forty-seventh cross-interrogatory. When did the interrogatories and cross-interrogatories for this your deposition first reach you? Give the date. State in what manner your answers have been prepared and made thereto or any of them. Have written answers to any of said interrogatories or cross-interrogatories, in whole or in part, been prepared by you or by any one else for or in connection with you before or preparatory to your appearance before the officer? Have you consulted any other, and what, person as to your answers or any of them? Are your answers made and given to each
158 separate interrogatory and cross-interrogatory orally to the officer without memoranda or data therefor in writing prepared by yourself or by any other, and, if any other, by what, person, and without suggestion, advice, or influence by any other person as to what your answer should be to any of said interrogatories in whole or part?

Forty-seventh answer. To the forty-seventh cross-interrogatory he saith: The interrogatories first reached me the twenty-ninth day of September, 1882. My answers thereto have been prepared and made by appearing before the officer and orally making reply to each question as it was propounded, no one else aiding me or being consulted as to how I should make answer to said interrogatories or any of them prior or preparatory to my sole appearance before the officer. My answers are made to each interrogatory, direct and cross, verbally to the officer, without memoranda or data therefor, prepared by myself or any one else, or any writing other than by an occasional reference to such papers and memoranda as constitute part of the history of the White stock transactions for the purpose of refreshing my memory therein, and without suggestion, advice, or influence of or from any person whatever as to my answers to any of said interrogatories.

Last cross-interrogatory. Is there any fact or are there any facts known to you or believed by you to exist, for which you think you have good grounds of such belief, which, if fully and fairly stated, and facts in connection therewith explained, would tend to the advantage or benefit of the defendant in this suit? If so, answer and state all such facts and matters fully.

BALLINGER & MOTT,
Counsel for Defendants.

Last answer. To the last cross-interrogatory he saith: There are not other facts within my knowledge which would be or tend to the advantage of the defendant to this suit.

THOMAS J. MOLTON.

Notice to Complainants' Counsel.

The letters from which extracts purport to be copied in the cross-interrogatories are in bound volume, and the correctness of said extracts and that they are in the handwriting of said Molton will be submitted for inspection to complainants' counsel and for information therein.

BALLINGER & MOTT,
Counsel for Defendants.

(EXHIBIT 1, ANNEXED TO CROSS-INTERROGATORIES.)

J. T. Holtzclaw, attorney-at-law, No. 6 Perry St.

MONTGOMERY, ALA., *Jan'ry* 23, 1878.

Messrs. Ballinger, Jack & Mott.

GENTLEMEN: You will deliver any papers or memoranda relating to estate of David White you have to J. R. Coryell; said
159 papers left with you in 1869 by myself and Robert Y. Ware, executor of Robert J. Ware.

THOMAS J. MOLTON.
ROBERT Y. WARE,
Executor Rob't J. Ware,
By J. T. HOLTZCLAW.

Received, Galveston, February 9, 1878, of B., J. & M., package of papers stated by them to be in compliance with above letter or order.

J. R. CORYELL.

STATE OF ALABAMA, }
Montgomery County. }

I, A. J. Perdee, the undersigned commissioner, called upon to take the deposition of Thomas J. Molton in the agreement between the solicitors of both parties in cause in equity No. 155, in the United States circuit court for the eastern district of Texas, at Galveston, hereby certify that I am personally acquainted with the said witness, Thomas J. Molton, and know him to be the identical person named in said agreement (commission having been waived); that he was sworn and examined as above stated, and that his evidence was taken down, as near as might be, in his own language, and was subscribed by him in my presence on this the twenty-eighth day of October, 1882, at the place above stated, city of Montgomery, in the county and State aforesaid.

A. J. PERDEE, [L. S.]
Commissioner.

ASENATH A. WARE *et als.*, Complainants,
vs.
THE GALVESTON CITY CO., Defendant.

In Circuit Court of the United States, Eastern District of Texas, at Galveston.

It is agreed that depositions of Robert Y. Ware, of Montgomery county, Alabama, and of Asenath A. Ware, one of the complainants, be taken on the following interrogatories and cross-interrogatories, on behalf of the complainants, by any notary public or United States commissioner or commissioner for the State of Texas, in Montgomery county, Alabama, and be returned by the officer taking the same to clerk of this court, and to be opened by him at request of any solicitor for either side; copy, time, and commission waived; said deposition to have same effect as if taken and returned under commission, and same to be taken in accordance with equity practice in United States court for which the same is taken.

M. C. McLEMORE,
GRESHAM & JONES,
MANN & BAKER,
Counsel for Complainants.
BALLINGER & MOTT,
Counsel for Defendant.

160 *Deposition of Robert Y. Ware.*

UNITED STATES OF AMERICA,
Middle District of Alabama.

Deposition of Robert Y. Ware, a witness sworn on the thirtieth day of October, 1882, at Montgomery and in the county of Montgomery, under and by virtue of an agreement between the solicitors of both parties, waiving the commission, in a cause in equity No. 155, pending in the United States circuit court at Galveston, Texas, for the eastern district of said State, between Asenath A. Ware *et als.*, plaintiffs, and The Galveston City Company, defendant.

The said ROBERT Y. WARE, being sworn to speak the truth, the whole truth, and nothing but the truth, doth depose and say as follows:

First interrogatory. What was your relationship to David White, deceased? Who administered on his estate? Did you know anything as to whether or not the estate of David White or his heirs realized anything, and, if so, what, of any proceeds of any sales or transfers of the stock of the Galveston City Company for which this suit is brought?

First answer. To the first direct interrogatory he saith: I am the grandson of David White, deceased. Robert J. Ware, my father, administered on the estate of David White. Neither the estate nor heirs of David White, nor the representatives thereof, have

ever realized anything whatever from proceeds of sales or transfers of shares of stock for which this suit is brought.

Lastly. Do you know or can you set forth any other matter or thing which may be of benefit or advantage to the parties at issue in this cause, or either of them, or which may be material to the subject of this your examination or the matters in question in this cause? If yea, set forth the same fully and at large in your answer.

GRESHAM & JONES.
MANN & BAKER.
M. C. McLEMORE.

Last. To the last (being the second) interrogatory he saith: I know nothing more that is material to the matter in issue or of advantage to either side save as follows: That on the trip to Galveston, Texas, early in 1869, I found Ballinger, Jack & Mott representing some matters concerning lands and lots which were mainly the result of the surrender of the David White stock to the company called the Galveston City Company, and as representing the estate of R. J. Ware, Esq., who had been executor of David White, I consulted with and employed therein *as* attorneys to continue the investigation of lots and lands and other matters of the estates of either, they having some joint connection.

And on same trip my brother-in-law, Thomas J. Molton, as agent for the David White heirs and his estate, employed said legal firm to investigate and ferret out the true status and condition of stock of David White in the Galveston City Company, and whether the said stock or certificates therefor had all been legally transferred to others and to whom, and the title thereto divested out
161 of White's estate, and they undertook said investigation and agreed to push the same unto legal proceedings against the company, and would report progress as often as practicable, and said Molton carried on a long correspondence with Ballinger, Jack & Mott from that time until about 1878, and frequently exhibited to me their letters, which, among other things, showed that they were looking into the said matters of White's estate, and giving reasons for the delay in suing the company. We left with said firm (of B., J. & M.) all the papers we had of both estates to aid them in their examination of our rights. About the first of 1879 T. J. Molton returned to Texas and, not being satisfied with the dilitoriness of said firm, he gave charge of the White business to other attorneys, who are the solicitors in the present suit against the company. It is my understanding that my grandfather, David White, to whom the sixty-seven shares of stock in the Galveston City Company were issued — 1838, was sole owner of the same and of the certificates thereof, and he made one A. S. Lipscomb his agent for the disposition of said stock or certificates and gave him for compensation an interest in the proceeds of such property as he might reinvest in after selling as much of the stock as he could profitably. I gather this from the necessary inferences I drew from

the papers in connection with the stock and from conversations with my father and grandfather.

R. Y. WARE.

Cross-Interrogatories to the Witnesses Asenath A. Ware and Robert Y. Ware.

First cross-interrogatory. What was the date of the marriage of the witness Mrs. Asenath A. Ware to Robert J. Ware, and what was the date of the death of said Robert J. Ware?

First answer. To the first cross-interrogatory he saith: Asenath A. Ware was married to Robert J. Ware early in 1826, and Robert J. Ware died November 1, 1867.

Second cross-interrogatory. Who, as executor or administrator of the estate of David White, gave attention to the business of the estate of said David White? Was it not mainly Robert J. Ware? Was not his widow, Mary S. White, named as an executor of the will of David White? Did she act as such? Who of the children or grandchildren of David White gave attention to the business of the estate?

Second answer. To the second cross-interrogatory he saith: R. J. Ware alone acted as executor of David White's will, Mary S. White, though named, not acting. The children and grandchildren of David White did not give much attention to his business.

Third cross-interrogatory. Who was Dr. Clement Billingslea and how was he related to David White and to you?

Third answer. To the third cross-interrogatory he saith: Dr. Clement Billingslea farmed and practiced medicine near
162 Montgomery, Ala.; was a nephew of Mary S. White, wife of David White, and was my third cousin.

Fourth cross-interrogatory. Did not said Dr. Billingslea come to Texas in the year 1842 or 1843, and on what business did he come to Texas? Was it not in part or whole the procurement of Robert J. Ware or of some other, and what, person in order to obtain settlement with Judge Lipscomb of his business with the estate of David White, or did it not have some, and what, connection with the business of the estate of David White?

Fourth answer. *Of* the fourth cross-interrogatory he saith: Dr. Billingslea went to Texas in 1842 or '43, in part for his own business, where he had an interest in some lands, and partly for R. J. Ware, as executor of D. White, to look into the general business of White's estate, including Lipscomb's connection with White's stock.

Fifth cross-interrogatory. The complainants have proved in this case a letter or communication made by G. Borden, Jr., then agent of the Galveston City Company, addressed to Dr. Clement Billingslea, dated twenty-third of June, 1843, containing statement in regard to the shares of stock of David White in the Galveston City Company. At whose instance or request or in whose behalf was said statement applied for and procured by said Billingslea, and to whom did he deliver the same, and when? Was not said statement procured for and delivered to Rob't J. Ware or for some, and what, per-

son interested in or connected with the estate of David White, then deceased?

Fifth answer. To the fifth cross-interrogatory he saith: From the papers looked over in the case the communication made by G. Borden, Jr., agent of the company, was no doubt obtained by Billingslea for R. J. Ware and delivered to him, but when I don't know. I found said paper among my deceased father's documents.

Sixth cross-interrogatory. Did not Robert J. Ware come to Texas in the latter part of the year 1843 or early in 1844, and did he ever come to Texas at any later date, and when; and was not his business in whole or in part to obtain settlement with Judge Lipscomb relating to his transactions with David White or his estate or to give attention to business relating to said estate? Answer fully, with your means of knowledge or information, as to the matters stated in your answer.

Sixth answer. To the sixth cross-interrogatory he saith: R. J. Ware did go to Texas in the winter of 1843–'4, mainly on business for David White's estate and partly to see Judge Lipscomb in reference thereto, and particularly to find out what he could about the White stock in the Galveston City Company. He went again to Texas in the spring of 1858. I answer as above partly from personal knowledge and from information derived from papers.

Seventh cross-interrogatory. What is the age of witness Robert Y. Ware?

Seventh answer. To the seventh cross-interrogatory he saith: Witness is fifty-five years of age fourteenth day of March last.

163 Eighth cross-interrogatory. Was David White's estate solvent or insolvent? What amount did he owe Robert Y. Ware at the time of his death? If you cannot state with accuracy or correctness, state approximately, and give your means of knowledge or information. Was not the witness Rob't Y. Ware executor or administrator of the estate of Rob't J. Ware, deceased? What has been the understanding or claim of those interested in the estate of Rob't J. Ware as to the state of accounts between the estate of David White, deceased, and said Robert J. Ware? State all facts in your knowledge to show the justness, correctness, or fairness of such understanding.

Eighth answer. To the eighth cross-interrogatory: David White's estate was entirely solvent. It was supposed at one time that it was largely indebted to R. J. Ware, but from the records of the chancery court it seems the same was fully settled. The deponent was executor of R. J. Ware, but his estate is now finally settled. I know of no understanding as to the state of accounts between the estate of D. White and R. J. Ware.

Ninth cross-interrogatory. Are there any facts without your knowledge or information showing or tending to show that whatever interest in all property in the State of Texas was devised to Mrs. Holtzclaw, one of the complainants in this suit, to Thomas W. Cowles, one of the complainants, and to David P. Lumpkin, one of the complainants, by the will of David White or the will of Mary S. White, or was inherited by them or any of them from said David

White or Mary S. White or either of them was at any time ever conveyed or belonged to Robert J. Ware or to his estate or any representatives thereof? Answer as to the interest of each of said parties, and if you know or have information of any such fact or facts state same fully.

Ninth answer. To the ninth cross-interrogatory he saith: I found among the documents of father's estate some papers purporting to be transfers to him by Mrs. Holtzclaw, T. W. Cowles, and D. P. Lumpkin, three of the complainants, of their respective interests in the estates of David and Mary S. White, the legal construction of which documents depend- upon the different lawyers who might be consulted. I know of no other facts in reference thereto.

Tenth cross-interrogatory. Have you stated that you do not know or have any information of any such fact or facts as referred to in the last preceding interrogatory?

Tenth answer. To the tenth cross-interrogatory he saith: I have so stated in last answer.

Eleventh cross-interrogatory. Is the administration on the estate of David White in the probate court, in Mobile, Alabama, closed or is there administration on said estate and the same still open? Who is the administrator?

Eleventh answer. To the eleventh cross-interrogatory he saith: The administration on the estate of David White was in Montgomery county, Alabama, and has long been closed, and there *is* no administrator.

164 Twelfth cross-interrogatory. In what manner have your answers to the interrogatories and cross-interrogatories been prepared to be given or made to the officer? Has any, and what, person or persons consulted or conversed with you in regard thereto? State names of all such persons. Have written answers to any of the direct or cross-interrogatories, in whole or in part, been prepared by you or by any one else for or in connection with you before or preparatory to your appearance before the officer? Has any, and what, person suggested or advised with you as to your answer to any of the direct or cross-interrogatories? Are your answers made and given to each separate and cross-interrogatory orally, to the officer, without any memoranda or data therefor in writing prepared by yourself or by some other, and what, person, and without suggestion, advice, or influence by any other person as to what your answer should be to any of said interrogatories, in whole or part?

Twelfth answer. To the twelfth cross-interrogatory he saith: My answers to the interrogatories and crosses have been made direct to the officer, without consultation with any persons (having first seen the interrogatories), and written answers have not been prepared to any of the same, no one having advised with me as to my answers given to each interrogatory orally, to the officer, without memoranda or data therefor in writing and without the suggestion, influence, or advice of any person or persons.

Last cross-interrogatory. Is there any fact or are there any facts known to you or believed by you to exist for which you think you have good grounds of such belief which, if fully and fairly stated

and parts in connection therewith explained, would tend to the advantage or benefit of the defendant in this suit? If so, answer and state all such facts and matters fully.

BALLINGER & MOTT,
Counsel for Defendant.

Last answer. To the last cross-interrogatory he saith: I know of no other fact or facts of advantage or benefit to the defendant.

ROBERT Y. WARE.

STATE OF ALABAMA, }
Montgomery County. }

I, A. J. Perdee, the undersigned commissioner, called upon to take the deposition of Robert Y. Ware in the agreement between the solicitors of both parties in cause in equity No. 155, in the United States circuit court for the eastern district of Texas, at Galveston, hereby certify that I am personally acquainted with the said witness, Robert Y. Ware, and know him to be the identical person named in said agreement (commission having been waived), that he was sworn and examined as above stated, and that his evidence was taken down as near as might be in his own language and was subscribed by him in my presence on this the thirtieth day of
165 October, 1882, and the place above stated, city of Montgomery, in the county and State aforesaid.

A. J. PERDEE, [L. S.]
Commissioner.

Filed November 3d, 1882.

C. DART, *Clerk.*

Deposition of Asenath A. Ware.

UNITED STATES OF AMERICA, }
Middle District of Alabama. }

Deposition of Asenath A. Ware, a witness sworn on the twenty-eighth day of October, 1882, at Montgomery, and in the county of Montgomery, under and by virtue of an agreement between the solicitors of both parties wa-ving the commission, in a cause in equity, No. 155, pending in the United States circuit court, at Galveston, Texas, for the eastern district of said State, between Asenath A. Ware *et als.*, plaintiffs, and The Galveston City Company, defendant.

The said ASENATH A. WARE, being sworn to speak the truth, the whole truth, and nothing but the truth, doth depose and say as follows:

(Interrogatories and crosses with same as to R. Y. Ware given on pages — of this transcript.)

First answer. To the first direct interrogatory she saith: I was the daughter of David White, deceased. My husband, Dr. R. J. Ware, was executor and acted as such. Neither the estate nor the

heirs of David White nor any representative or agent of either ever received any benefit from the proceeds of sales or transfers of David White'- stock in the Galveston City Company except from the proceeds of some lots in Galveston, which were the reinvestments of money obtained from the sale by A. S. Lipscomb, attorney-in-fact, of some shares, of which thirty-two lots Lipscomb realized the proceeds of nineteen.

Last answer. To the last direct interrogatory she saith: I know of nothing more material to the subject-matter in controversy or of benefit to either party, except as follows, viz: That my father, David White, went to Texas in 1836 and 1838 and served as agent of the Republic in various ways during her struggle for independence, and invested in sundry things and, among others, obtained an interest in one-tenth of the site on which the present city of Galveston is situated, and, after getting certificates for a large number of shares in the stock of Galveston City Company, he gave Judge A. S. Lipscomb a written authority to dispose of and transfer such certificates as he could profitably and instructed him to reinvest the proceeds thereof into other property in the name of the two, said Lipscomb to have half interest in the proceeds of the sale of said property so invested in as compensation for his services in so selling and
166 reinvesting. To the portion of said certificates not legally transferred under the power of attorney, and the title to which was never divested out of my father or his estate, nor heirs nor representatives or agent of either, nor my mother, Mary S. White, nor any one for her or her estate ever received any benefit whatever, in any manner or form. My husband, R. J. Ware, the executor, and and my son-in-law, Thomas J. Molton, the agent for the heirs of David White, both exercised all the diligence possible in trying to ascertain and assert the rights of complainants in and to any and all stock in the Galveston City Company to which they were entitled; my husband in sending Dr. Billinghslea to Texas as agent twice, going himself there twice, and by a long correspondence with one A. F. James, a real-estate agent in Galveston, and various lawyers, including Judge Lipscomb, and he failed to arrive at satisfactory information or practical result for some reason or other, but mainly because of what turns out to have been false statements concerning the status and transfers of the shares of stock rendered by said company and concealment by the company of the true facts about the same, and on account of the deaths of several parties employed before they had finished their investigations, and inability of others to make examination by reason of being shut out from access to the necessary records by resolution of the company; and the diligence of Thomas J. Molton is shown by a trip he made to Galveston in 1869, on which, after frequent ineffectual efforts, verbally and in writing, to the company to disclose our rights and settle the same, he employed Ballinger, Jack & Mott as attorneys to represent the estate and heirs of David White in ascertaining and enforcing their claim for stock against the Galveston City Company, if any had not been legally divested out of them, against the Galveston City Company, and left with them all our papers in con-

nection with said stock, and after several years (until 1878) of elaborate correspondence with said firm about that and other matters said Molton returned to Texas in 1879, at our request, and turned the case over to present attorneys of complainants, with such papers as he could get them to return to him. Finding that Ballinger, Jack & Mott were not really intending to bring any suit against the company, he again was sent by us to Galveston the passed summer to aid in the legal assertion of our rights, and has been in continuous correspondence and laborious efforts from 1869 to the present time. Witness knows the above facts from repeated conversations had with me by my deceased father and husband in the family circle and in many instances with one another in my presence and from talks with my son-in-law, who is our main agent in furnishing data which formed the basis of our suit. Deponent is further willing to claim and participate in any recovery that may be made against said City Company as heirs-at-law of David and Mary S. White, and so agreed before me the institution of this suit, with all the other complainants. My father always expected large results from his Galveston enterprise for his family, but nothing has ever been realized except as above stated.

ASENATH A. WARE.

167 *Answers to Cross-Interrogatories.*

First answer. To the first cross-interrogatory she saith: I was married to Robert J. Ware in the month of January, in 1829; said R. J. Ware died November 1st, 1867.

Second answer. To the second cross-interrogatory she saith: Robert J. Ware, as executor, mainly gave attention to the business of David White, Mary S. White having been appointed executor, but he alone qualifying. The children and grandchildren of D. White did not give much attention to his business nor that of his estate, except through agents and others.

Third answer. To the third cross-interrogatory she saith: Dr. Clement Billingslea was a farmer and a physician and connected with David White by being a nephew of his wife; he was my cousin.

Fourth answer. To the fourth cross-interrogatory she saith: Dr. Billingslea went to Texas in 1842 or 1843, mainly on the business of David White's estate and by the procurement of R. J. Ware, to obtain settlement with Judge Lipscomb of his business with the estate of D. White and on other business for said estate.

Fifth answer. To the fifth cross-interrogatory she saith: The communication of Gail Borden, Jr., of June 23, 1843, of which inquiry is made in this interrogatory, I have only heard of from others; therefore can't speak with certainty about the same.

Sixth answer. To the sixth cross-interrogatory she saith: R. J. Ware went to Texas the latter part of 1843 or early in 1844, and also in the spring of 1858, his main business on the first trip being to obtain settlement relating to his transactions with David White or his estate with Judge Lipscomb, and to give attention to other

business of his estate, and the latter trip was partially to find out any and all rights of said estate.

Seventh answer. To the seventh cross-interrogatory she saith: Robert Y. Ware is fifty-five years of age since the fourteenth of March, 1882.

Eighth answer. To the eighth cross-interrogatory she saith: David White's estate was amply solvent. Witness knows nothing about the indebtedness of David White or his estate to R. J. Ware at the time of his death. Robert Y. Ware was executor of Robert J. Ware. I know of no understanding or claim of those interested in R. J. Ware's estate as to the state of accounts between the estate of D. White and said R. J. Ware.

Ninth answer. To the ninth cross-interrogatory she saith: I have information concerning the matter inquired about in this interrogatory, viz., the turning over to R. J. Ware of their interests in the estates in Texas of Mrs. Holtzclaw, Thomas W. Cowles, and David P. Lumpkin from the estates of David and Mary S. White only from other persons, and have not seen any such transfer and cannot speak positively concerning the same.

Tenth answer. To the tenth cross-interrogatory she saith: I have stated that I have no such information except from heresay.

168 Eleventh answer. To the eleventh cross-interrogatory she saith: There never was an administration on the estate of David White in Mobile, Alabama, but in Montgomery instead, and it is my understanding that the administration in said last county has long since been closed, and that there is no administrator on said estate.

Twelfth answer. To the twelfth cross-interrogatory she saith: My answers to the interrogatories and cross-interrogatories are by personal appearance and verbal statement to the officer, without conversation or consultation with others in regard thereto and without written answers to the same by myself or any one else before or preparatory to my appearance before said officer and without suggestion or advice from any one, and my answers made orally to the officer as to each and every interrogatory, direct and cross, without memoranda or data in writing and without influence, advice, or suggestion by or from any person or persons whatever.

Last answer. To the last cross-interrogatory she saith: I know of no other facts existing that would tend to the advantage of the defendant herein.

ASENATH E. WARE.

STATE OF ALABAMA, }
Montgomery County. }

I, A. J. Perdee, the undersigned commissioner, called upon to take the deposition of Asenath A. Ware in the agreement between the solicitors of both parties in cause in equity No. 155, in the United States circuit court for the eastern district of Texas, at Galveston, hereby certify that I am personally acquainted with the said witness, Asenath A. Ware, and know her to be the identical person named in said agreement (commission having been waived); that

she was sworn and examined as above stated, and that her evidence was taken down as near as might be in her own language, and was subscribed by her in my presence on this the twenty-eighth of October, 1882, at the place above stated, city of Montgomery, in the county and State aforesaid.

A. J. PERDEE, [L. S.]
Commissioner.

Deposition of John P. Borden.

THURSDAY, *August 24th*, 1882—10.30 a. m.

By agreement of parties the examination in this cause was this day resumed.

Present: Geo. E. Mann, M. C. McLemore, counsel for complainants; W. P. Ballinger, counsel for defendant.

JOHN P. BORDEN, a witness introduced and examined on behalf of defendant, being duly sworn, testified as follows:

My name is John P. Borden; my age is seventy years; will be seventy years of age next December; have resided in Texas since January, 1830; reside now in Colorado county; was a practicing lawyer a short time—for two or three years; I would say from 1844 to 1849—say four or five years.

169 I was commissioner of the general land office of the Republic of Texas from July 1, 1837, about to December, 1840, throughout Gen. Houston's first term as president, and was reappointed by Gen. Lamar.

Gail Borden, Jr., who was the agent of the Galveston City Company, was my oldest brother.

I was at one time a subagent of the Galveston City Company, appointed by my brother, and was such from February 1, 1851, until the close of his agency, in 1854. I believe I signed myself agent *pro tem.* My agency was a *pro tempore* agency during the absence of my brother.

I was a good deal about the office previous to that time, as far back as 1841, but was not fully acquainted with the routine of the office as to the entries in the books.

(Defendant's counsel here produced to the witness a book from the Galveston City Company containing original certificates of trustees' stock cancelled by the company, and which was before the examiner and the subject of the examination of the witness, James P. Cole, and asked the witness to examine the endorsements on the back of certificates numbers 116, 118, 119, 120, 121, 122, and 124, out of Book A, and certificates numbers 34, 42, 43, 44, 45, 46, 47, 48, and 49, out of Book C, and state what he knew about said endorsements and the signatures of the same) whereupon the witness testified as follows:

I recognize my signature on each and every one of these said certificates; also the signature of Dr. Levi Jones. As to the signature

of A. S. Lipscomb, I am not familiar enough with his signature to recognize it generally, but from the fact that I witnessed his signature I presume I saw him sign all of said endorsements. I have no personal recollection of the transaction of witnessing said endorsements; am not able to recall it to mind.

Question by defendant's counsel. Was the date which now appears on said endorsements, first of July, 1841, on the papers when you signed as a witness or has it been placed there since? If you do not recollect personally, state your belief from the appearance of the writing and all facts known to you.

Objected — by complainants' counsel, to so much of the question as follows: "If you do not recollect personally, state your belief from the appearance of the writing and all facts known to you," on the ground that the question is leading and because it invites the belief of the witness as to the matters about which the witness has already testified he has no present recollection.

Answer. I must say that I do not think I would have signed as a witness without a date before me. I believe that the date was there at the time that I signed the endorsement as a witness.

Question by defendant's counsel. What does the appearance of the writing indicate as to the time the date was written— "whether written at the time or at any other time?"

Objected — by complainants' counsel upon the ground that
170 the witness has not in any manner qualified himself, as an expert or otherwise, so as to authorize the defendant's counsel to ask the witness the question as to when the signature of Lipscomb or the date above it was in fact written, and because the question is leading; and, again, because the question assumes that the date of the endorsement and the signature, as it appears on the paper, was the actual date of the execution of the writing, both as to the endorsement and witnessing; and, again, because there is no predicate laid by any evidence heretofore introduced tending to show that the transaction to which the endorsement relates was anything other than the mere writing of the name of Abner S. Lipscomb, attorney-in-fact for David White, and as the signature of Abner S. Lipscomb appears on the several certificates, and because the evidence undertaken to be elicited is irrelevant to the issue, in this, that the endorsements, taken as a whole, on the back of the several cirtificates does not evidence the transfer, assignment, or sale of the certificates by David White or by any one thereunto authorized by him.

Answer. I should say from the appearance of the writing that it was written at the time it purports to be, first of July, 1841.

(Defendant's counsel here again exhibiting the said book to the witness requested him to examine the face of the said certificates and state in whose handwriting the endorsements of their surrender and renewals are) to which the witness testified.

They are all in my handwriting except one, Book A, No. 120. I

mean the endorsement and not the signature, which signatures are in my brother's handwriting, Gail Borden, the agent.

Question by defendant's counsel. Had there been any insertion of a false date of the endorsement of the certificates on the back of them would you have failed to observe it when you wrote the endorsement of renewal on the face of the certificates?

(The question is objected to because it asks the witness for no information as to any fact within his memory or knowledge and seeks to elicit from the witness his belief as to what he would or would not have done in a supposititious case, as stated in the question.)

Answer. I must say, in answer to that, that while I was not interested and there was no responsibility resting upon me I would not have made the endorsement if I had believed there was anything wrong or defect or error in the date of endorsement on the back of the certificates.

Question by defendant's counsel. Would you or not have signed as a witness to endorsements with a false date?

(Same objections to this question as to last preceding.)

Answer. No.

Question by defendant's counsel. At the time you witnessed the endorsements had you any reason to suppose that David White was dead?

Answer. I had not.

(In answer to further questions witness states that up to
171 the time of my connection with the company as *pro tem.* agent and throughout that connection or since I never knew or heard anything leading me to believe or suspect that anything wrong or illegal had been done by A. S. Lipscomb or the City Company connected with the stock issued to David White. I speak as to the time up to the institution of these proceedings.)

Question by defendant's counsel. Were or were not transfers of trustee stock of the company made by endorsement in blank; and, if so, to what extent was this done—rarely or customary?

(Objected — because leading and because the matter undertaken to be put in evidence is not competent to be shown as evidence of the lawful or proper transfer or assignment of the certificates; because by the terms of the certificates themselves and by the deed of trust authorizing their issuance a different mode of transfer was stipulated and provided, and no custom or usage can be shown to vary the mode of transfer.)

Answer. My recollection is that it was frequently done of trustees' stock at that date—referring to the first of July, 1841—and they then passed by delivery from hand to hand.

JOHN P. BORDEN.

Cross-examined by complainants' counsel:

I could not fix any particular date as to when I first heard of the

death of David White. I cannot recollect that I heard of it more than eight years back. I was acquainted with James Love. I have an impression that he died during the war, between fifty-nine and sixty-four; do not know the year. Gail Borden died eleventh of January, 1874. This is my memory. I was present at his death-bed. I was well acquainted with M. B. Menard. My impression is he died in 1866—since the war. Levi Jones died, I should say, in 1879.

I do not believe I would have put my name as a witness without there had been a date—referring to the endorsements on the several certificates which had been exhibited to me on my direct examination. I say this for the reason that I believe I had some business capacity in those days and that it would not—been business-like to make the transfers without a date. I do not recollect the time when in fact it was done. I do not believe that I have witnessed a transfer where the date was in blank of these trustee certificates.

(Counsel for complainants here exhibited to the witness the same book of certificates before him on the direct examination.)

Upon examining the book I find that I have witnessed the transfer—that is, the signature to the transfer—of ten certificates of trustee stock exhibited to me, of which eight are not dated and two are dated. The explanation I give for this is that I wrote the endorsements on the face and back of the certificates. The one on the front is dated, and I believe I wrote the one on the back at the same time, being then the agent of the company. I find that I did date two of the transfers, and it was an
172 omission not to date the eight, but I believe it was all done in the office at the time both endorsements on the certificates were written. I cannot say positively that the signatures to the transfers were written on the date the transfers were written by me. I believe the transfers were made July 1st, 1841, because of my confidence in the man, Abner S. Lipscomb, who signed the transfers. This is my only reason for believing this. I think the witnessing by me occurred in Galveston, because I was in Galveston during the summer of 1841 and up to the spring of 1842. I have no personal recollection of what the transaction was.

I think generally where certificates of trustee stock were signed in blank evidenced a sale, but sometimes might have been hypothecated or money borrowed on them.

Upon examining the sixteen certificates I cannot see any evidence which would lead me to doubt that they were all signed by Abner S. Lipscomb at the same time.

I have no personal recollection of who was present when these transactions were witnessed. I do not know that Levi Jones signed at the same time I did; do not think all the signatures were put on at the same time. I should say that my name was put there at the same time that Abner S. Lipscomb's was. I do not understand what object James Love's name has on the certificate, but I see that it was on the surrender to the company. I should say, from the look of it, that Levi Jones' name was put on at the same time James

Love's was. I came to Galveston to live in the spring of 1841 and was here until the fall of 1843, but was away two times.

In 1841 or up to 1850 or at any time up to the last eight or ten years, I have no recollection to have heard of David White's death.

I knew James Love and knew his signature, and the signature on these certificates of James Love I believe to be his. I mean James Love, a director of the company.

Do not know where Judge Lipscomb lived in 1840 and 1841.

JOHN P. BORDEN.

And thereupon, by agreement of counsel, the examination was adjourned until Saturday morning next, August 26, 1882, at ten o'clock.

Attest:

C. DART,
Examiner in Equity.

Deposition of Ashbel Smith.

MONDAY, *Sept.* 4, 1882—12 o'clock m.

Examination resumed by agreement of counsel.

Present: Geo. E. Mann, M. C. McLemore, and S. W. Jones, counsel for complainants, and W. P. Ballinger, counsel for defendant.

ASHBEL SMITH, a witness introduced by defendant, being duly sworn, testified as follows:

173 Examination-in-chief by defendant's counsel:

My name is Ashbel Smith; I reside in Harris county, in Texas; I came here at the request of the counsel of the defendant.

I have resided in Texas since the winter of 1836–'37, in the year 1837.

I was surgeon general of the old army of Texas, being confirmed by the senate of Texas in June, 1837, being then thirty years, past, of age. I was minister plenipotentiary of the Republic of Texas to the court of France and also to the court of Great Britain early in 1842. I sailed on my way to Europe from Galveston in March, 1842. I returned from France and reached Texas on my return early in January, 1845. I found my appointment as secretary of state on reaching the seat of government in January, 1845. I acted as secretary of state until March of the same year, to wit, 1845. I was then reappointed minister plenipotentiary to France and also to Great Britain, and sailed from Galveston, in March of the same year, for Europe. I returned from Europe late in the summer or early in the fall of that year. I was appointed one of the visitors to West Point in 1848, and was elected president of the board of visitors. I have been three times a member of the State legislature of Texas. I entered the Confederate service at the commencement of the cival war; was elected captain by a company raised in my own neighborhood, which company was afterwards organized as one of the companies of the Second Texas Infantry. I was promoted from a junior captain to be lieutenant colonel at the battle of Shiloh. I was in command of a portion of the lines at Vicksburg, and was captured

on the surrender of that place. For some time previous and up to the close of the war I was in command of the district of the defenses of Galveston. After the news of Gen. Lee's surrender had reached Texas Gov. Murrah and Gen. Magruder sent the Hon. Wm P. Ballinger and myself to New Orleans to make a surrender of Texas to the Federal officer commanding that Federal department. In 1881, under the act for organizing the University of Texas, I was appointed one of the regents, which appointment I still hold.

I owned at different times four shares in the Galveston City Company. To the best of my careful recollection, I never owned any other.

(Defendant's counsel here produced to witness the book containing original certificates of trustees' stock cancelled by the City Company, heretofore in evidence before the examiner, containing certificates numbers 10, 12, and 28, out of Book C, and the witness was requested by counsel to look at said certificates and state his knowledge of said certificates.)

The three certificates in question are three of the certificates formerly held by me, and I recognize them by my endorsement in my own handwriting on the back. By the word endorsement I mean my name being written in two places on each certificate in my usual handwriting, which I recognize to be genuine.

174 I transferred the three certificates just shown to me, on or before the tenth of July, 1840, to Gen. Memucan Hunt in payment for two lots in the city of Galveston, block 499, lots 8 and 9. The certificates in the transaction between Gen. Hunt and me were rated at $500 apiece in Texas money. The whole transaction of purchase and payment was completed at the time. Gen. Hunt asked me for the lots $1,500, which he said was the cost of them to him. He said that I could pay in three shares of Galveston City Company's stock at $500 apiece, which three shares in payment I so delivered him. I do not remember from whom I bought the three shares. They had on them the endorsement of David White, by Abner S. Lipscomb, attorney-in-fact. I knew Lipscomb at that time intimately, as the word intimately is commonly understood. I knew his handwriting, and was satisfied then and now of the genuineness of his signature on the back of the certificate. I delivered the certificates to Gen. Hunt in payment for the lots with my endorsement on them in blank.

Question. Did you or not have any impression or understanding at the time that the mode of the transfer of the certificates to you and by you, by endorsements in blank, was not sufficient to pass the title to the certificates or was in any respect irregular?

Answer. I believe that the transfer was regular and customary.

I paid the current value for the certificates at the time, but do not recollect the amount. The title to the lots is from the City Company to me, and is dated the tenth day of July, 1840. I have owned the lots ever since, and own them at the present time.

My impression and understanding at the time and is now that Gen. Hunt had purchased the lots from the City Company, and that the

title was made to me by the City Company by his, Gen. Hunt's, order.

I built on the lots in 1840 and in 1841, and resided there. In March, 1842, one of the houses was occupied by Gen. Houston as his executive office.

I have traded very little in personal estate or real estate. I have never in any way been a speculator or trader in lands of any kind. I think in all of my business transactions I have aimed to be particular and careful to do business in a business way, and not to do it loosely.

My statement in regard to the certificates and the use of them in payment for the lots is not at all doubtful, but is entirely positive, both as to the numbers, as to the party to whom delivered, and as to the general date of their delivery.

Except one other lot, bought from Gen. Baker, I never owned any other real estate in the city of Galveston, and, except one other share of stock in the Galveston City Company, I never owned any other except these three.

I never had the least interest in the certificates which issued in renewal of these three shares of stock, nor had I any interest in these certificates after the delivery of them to Gen. Hunt. I have never had any interest in the original certificates, nor in the cer-
175 tificates issued in renewal of them, after the delivery of the originals to Gen. Hunt.

Whatever was done for the renewal or transfer of renewed certificates was done without any interest on my part and for the accommodation of the parties in interest.

I know the handwriting of B. F. Tankersley. His signature is familiar to me, and I have no doubt of the genuineness of his signature as a witness to the endorsements on the back of the three certificates. I do not recognize the signature of any of the other witnesses to the endorsement by Lipscomb.

ASHBEL SMITH.

Cross-examined by counsel for complainants:

(The three certificates numbers 10, 12, and 28, out of Book C, were here exhibited by complainants' counsel to the witness and the endorsements dated March 5th, 1845, exhibited to the witness and the witness requested to state when the signature of Ashbel Smith was written under the writing immediately above it.)

I was in Galveston at or about that time, March, 1845, and the signature under that endorsement is a genuine signature, but whether my name was signed before or after the endorsements were written and dated I do not know. I suppose that I signed the endorsements at the time purported, but do not remember. I do not remember about the certificates being brought to me in March, 1845, but suppose they were, and that I signed them. As I had no interest whatever in them, the circumstances would not likely fix themselves in my memory.

I do not remember that I had any transactions in regard to these

three certificates in 1845, but presume I had from seeing the endorsements over my signature, which is genuine.

As to the renewal of the three certificates in my name, I have no recollection of authorizing such certificates to issue, inasmuch as I did not charge my memory with it, having no interest in them nor in the party to whom they might be transferred or delivered or to whom they belonged, all my interest in them ceasing on my delivery of them to Gen. Hunt.

To the best of my knowledge and belief no new certificates were delivered to me. If they had been I think I should have remembered it. At this time my confident belief is that I never saw any new certificates. They might have been exhibited to me, but in the urgency of business I do not remember it.

I never sold these new certificates nor authorized any one to sell or sink them for me. I have certainly no recollection of anything of the kind.

In my transaction with Gen. Hunt I have no recollection of the numbers of the shares of stock delivered to him—that is to say, no independent recollection of the numbers the certificates bore or of which book they came.

Question. Is it beyond the range of possibility that you
176 might have delivered to Memucan Hunt three other and different certificates from those referred to in this examination?

Answer. It is not beyond the range of possibility.

As an independent fact, I do not know that the three certificates referred to were of those which were issued to David White. I only remember that they were City Company stock.

I do not remember of having any other transaction in City Company stock than these three and the one previously spoken of. There might have been other stock passed through my hands, but I have no recollection of it.

My only memory of these three shares of stock, as to the last transaction with them, was my delivery of them to Memucan Hunt in 1840, except for the endorsement on them.

I do not know where Lipscomb lived in 1840.

I know he was at one time secretary of state, but whether in 1840 or not I do not recollect.

In regard to the purchase of these three certificates, I do not remember at all from whom I purchased. I know affirmatively that I did not get them from Hunt.

I know I did not get them from Hunt, because I wished to pay them to him.

Question. Might it not have been that Hunt could have sold you the particular certificates which you delivered to him, the same having been the property of some other person?

Answer. It is possible, but by an intermediary. If he had handed them to me it would have been so odd a transaction I think I should have remembered it.

The words "I assign the within certificate to Ashbel Smith," on certificate number 12, are written by me. On the other, the words "Ashbel Smith" are written by me above the endorsement, "David

White, per Abner S. Lipscomb, att'y-in-fact." The words of assignment were not written by me, and I do not know by whom those words were written.

I do not remember what words I put on the certificates when I delivered them to Hunt.

I did not know David White and do not know when I first heard of his death.

In 1840, by ordinary modes of travel, it would take four or five days to make the trip from Austin to Galveston.

In 1840 the capital of the Republic of Texas was at Austin.

And thereupon, by agreement of counsel, the examination was adjourned until to-morrow morning, at 10 o'clock.

Attest: C. DART,
Examiner in Equity.

177 TUESDAY, *Sept.* 5, 1882—10 a. m.

Examination resumed pursuant to adjournment.

Present: Geo. E. Mann, M. C. McLemore, and S. W. Jones, counsel for complainants, and W. P. Ballinger, counsel for defendant.

And thereupon the witness, ASHBEL SMITH, being present, his cross-examination was resumed by complainants, and the said witness, being duly sworn, testified as follows:

I received my deed from the Galveston City Company at the time or very near the date of the deed. I took possession of the lots at the time and have had possession ever since; not constructive possession, but actual possession.

I do not recollect whether the deed is recorded. I opened the deed the other day and looked at the date of it, but did not look to see whether it had been recorded or not.

I do not know whether I ever did or not borrow money on the lots. They were sold for taxes at one time and I redeemed them. I have never been for one moment out of the possession of the lots from the time I took possession of them until the present time.

My only conjecture of the transfer of 1845 is that my name was connected with the transfer of the certificates, and that the forms of the office required the transfers.

I do not recollect of borrowing any money on the credit of these lots. The only moneys I remember to have borrowed since I have been in Texas was on the occasion of the purchase of a mule and to secure money that William Anders raised for me to pay off a note for $600 given to Ayres for services in connection with an eleven-league grant, in which I was trustee. In either case I do not remember what property I gave as security.

If I had given two deeds of trust on this property I do not know whether I would remember them or forget them.

Upon my memory being refreshed by a memorandum from the records of Galveston county I remember that I gave a deed of trust in 1850 to secure $400 borrowed from Wm. Hendley & Co.; gave the deed of trust on the two lots; and also, from another memoran-

dum from the records of Galveston county, I remember of borrowing or have a vague recollection of borrowing some money in 1858; do not recollect the amount, but it was in 1858 or thereabouts; do not recollect that the two lots were pledged to secure this latter amount; have no recollection at this time of the circumstances attending that transaction.

Do not remember whether I have paid these two amounts, but have no doubt they are paid.

ASHBEL SMITH.

Re-examination by counsel for defendant:

I examined at the office of the City Company yesterday morning the receipts given by me, in a book shown me by Judge Cole,
178 the agent of the company, for the three shares of renewed stock issued in my name in March, 1845. I recognized my signatures to the receipts as genuine; also recognized my signature to a power of attorney to A. F. James for the sale of these three certificates as genuine.

The signatures to the receipts on the book in the City Company's office are genuine, but, as I had no interest, present, past, or future, in the transaction, I do not remember the attendant circumstances of signing those receipts or of signing the power of attorney, the signature of which is genuine.

I had no interest in the renewed certificates that I can remember. It seems to me if I had had, there would be some trace of memory.

I do not recollect things in which I have no interest.

The assignment and the signature on certificate number 12 is in my handwriting. The words of the assignment on the other two certificates are not in my handwriting, but my name, completing the assignments, is in my handwriting.

My strong belief is that these were written on or before July 10, 1840, when I got the certificates.

I delivered the certificates to Gen. Hunt. My impression is that I assigned them in blank by writing my name on the certificates at the time.

ASHBEL SMITH.

It is agreed by the counsel, before the examiner, that the book containing the receipts for the three certificates, testified to by Ashbel Smith, and the power of attorney from Ashbel Smith to James, referred to, and the deed from the City Company to Ashbel Smith for lots 8 and 9, in block 499, in the city of Galveston, shall be produced for the inspection of counsel and on the trial of the cause.

And thereupon, by agreement of counsel, the examination was adjourned until such time as counsel may consent to resume the same.

Attest:

C. DART,
Examiner in Equity.

Deposition of Joseph Bates.

WEDNESDAY, *Sept.* 27, 1882—10.15 a. m.

Examination resumed by agreement of counsel.

Present: Geo. E. Mann, M. C. McLemore, counsel for complainants, and W. P. Ballinger, counsel for defendant, and the witness, Joseph Bates.

And the witness, JOSEPH BATES, being duly sworn, testified as follows:

Examination-in-chief on behalf of defendant:

My name is Joseph Bates; aged seventy-six years, and reside in Brazoria county. I came to Texas the latter part of 1846,
179 from Mobile, Alabama, where I had resided all my previous life, in the county of Mobile. I was sheriff of Mobile county three years; tax collector one year; was a member of the legislature of Alabama two or three terms. I was a major general of militia; was elected clerk of the circuit court of Mobile county, Alabama. Since I have been in Texas I have been mayor of Galveston, United States marshal, and a Confederate colonel during the late civil war; was county commissioner of Brazoria county several years; was bank director at Mobile several years.

I knew David White in Mobile, Alabama. We knew each other very well. We were intimate. He was a large planter up the country, but when he came to Mobile he kept a hotel, which he built. He was a speculator; attended auctions when there was a sale of important property. He was at one time a director of the State bank, and at one time, I think, president—that is, of the State bank branch.

I knew Abner S. Lipscomb well in Alabama. I do not remember where our acquaintance commenced, but it was very early. He was at one time chief justice of Alabama; was first circuit judge. After he resigned as judge he removed to Mobile and engaged in the practice of law. The relations between Abner S. Lipscomb and David White in Alabama were very friendly. My remembrance is that Lipscomb & Dunn were White's lawyers.

There was a business arrangement between White, Lipscomb, and myself, which was proposed by them to me, that we would raise a purse of $10,000 and send White to Texas with a view to investments. I do not remember the year this was, but it must have been between 1835 and 1840, after the independence of Texas. It was about the time that David White came to Texas. That was the object of the partnership, that he was to come to Texas and make the investments for himself, Lipscomb, and I. So far as I was interested, he bought soldiers' scrip at ten cents per acre and returned me my money unexpended, and stopped, so far as I was concerned. Ten thousand five hundred acres was the purchase for the partnership. I was afterwards informed that White and Lipscomb had made other investments in Texas.

(Counsel for complainants object to the witness testifying as to his information as hearsay.)

When I heard of it I went to them and inquired why I was not let into the investment in Galveston and elsewhere, and they said that it was such a big thing that they thought I would not like to go into it. White said they had to take the oath of allegiance in order to hold property here; that he had taken it, and I found that the titles and everything and patents were in his own name. He told me this himself—that he had to do it.

(Counsel for complainants object to witness testifying as to statements made to him by White or Lipscomb.)

When I speak of a big thing I mean the investment in Galveston. I wanted to know why my money was returned, why it was not put in. He said he did not require any money for that investment. It was his design to leave me out, and he did it.

180 Abner S. Lipscomb was elected to the legislature, in Mobile, Alabama, in August, 1838, after the warmest contest I ever went through. He resigned before his term expired and came to Texas to attend to the business and interests in which he and White were interested.

I talked with both White and Lipscomb about Lipscomb coming to Texas. Lipscomb was embarrassed in Alabama. He never had anything much. His friends were helping him. White had money and Lipscomb had ability.

As I understood it, the property in Texas must have an owner, and, as White could not come, Lipscomb had to come and represent it. I understood this from both of them.

(Counsel for complainants object to the witness stating what he understood from those parties.)

Lipscomb was very popular in Alabama and his friends were very loth to give him up.

What I mean by the words "have an owner" I mean that there should be an owner resident in Texas. White had large interests in Alabama and could not come here—could not remain here—and Lipscomb came here to represent their property, as I understood it. He was elected a member of the legislature, as I have stated, in 1838, for one year, and resigned before his term expired and moved to Texas. I do not remember the precise time. There was a change in the constitution of Alabama changing the term from one to two years, but whether this was before or after Lipscomb's election I do not remember. He may have been elected for two years.

David White told me that he had taken the oath of allegiance in Texas; that he could not hold property without having taken it. This led to a good deal of discussion and commotion in Mobile as to whether he would not have to be naturalized there.

White could not remain here, because his absence from Alabama injured his business affairs there, and he thought I was unkind in complaining about my interest being in his name, because Lipscomb did not complain.

Question. Did White tell you or say to you that Lipscomb was coming to Texas as his, White's, agent or attorney as respects property owned alone by White, or what was the nature of White's interest in the property Lipscomb was to attend to?

(Counsel for complainants object to the foregoing question upon the grounds heretofore stated, and because leading, and because the interests for which Lipscomb purported to come over related exclusively to such as required the owner to be a citizen of Texas, and because irrelevant to the subject-matter of controversy in this suit.)

Answer. White told me that Lipscomb was coming to Texas to take the position that he, White, had occupied as a citizen of Texas. White never told me that Lipscomb was coming to Texas as his, White's, agent or attorney, but he told me that Lipscomb was coming to Texas to represent property that was mutual and joint between White and Lipscomb, and White told me that Lipscomb would look after my interest, too. White told me that the interest of
181 himself and Lipscomb in the investment in Galveston was a partnership between them.

I knew Robert J. Ware. He was David White's son-in-law and was executor of David White's estate. He was a man of ability and popularity. He had the reputation of being an energetic business man and very close in money matters. He was a man of wealth; was a large planter and frequently in the Alabama legislature. I received a letter from Ware during the last visit of Ware to Texas, about 1852 or 1854, in which he complained very much about Lipscomb not settling up with David White's estate. This was the business which brought him to Texas to see Lipscomb about the business. I read this letter over in overhauling old letters a few months ago and destroyed it with others.

I brought a suit for partition of the soldier lands between Lipscomb, White's heirs, and myself, and commissioners were appointed and the lands divided. It was all in white's name, patented in 1849 to David White. It was partitioned by the district court of Bexar county.

J. BATES.

Cross-examined by counsel for complainants:

In making up the purse of $10,000 I put in one-third and White and Lipscomb put in the balance. The purchase of the 10,500 acres did not consume all my money and I got the balance back. I do not think it was a year from the time White took the money to invest when he returned me the balance uninvested. He reported that he had invested in the soldier scrip so far as I was concerned, and that he had invested for himself and Lipscomb in Galveston and elsewhere. He left the impression on my mind that he had taken the whole island in.

I did not understand from him that he had use for money in the Galveston investment. He did not tell me how he acquired the Galveston interest.

I do not know that White told me directly that he owned one-

half and that Lipscomb owned one-half in the Galveston purchase, but the idea I got was that they were equally interested. I got that idea from White himself, but I cannot remember his language. This is the idea I got—the substance of the language was that they owned it equally, the whole of Galveston island, as I understood. The investment in Galveston was the leading one. I think there were other investments made, but I do not know. I did not see Lipscomb put any money in the $10,000 purse, but White told me they were jointly interested. White was wealthy and could control as much money as he wanted. Lipscomb, I do not think, could control a great deal; he was never considered a man of wealth in our country. When he left he left large debts and was in straightened circumstances. He had completed a fine house in Mobile just before he left and it was a surprise; think he got large help from friends.

I think David White died in 1841 or 1842; do not remember the date.

182 My understanding is that a man might buy this soldier scrip, but if he wished to retain ownership he must be a citizen of Texas. White told me that he had to take the oath of allegiance in order to legalize his investments.

I do not know that I made any subsequent inquiries of any one as to the extent of White's purchase in Galveston.

I do not remember the date of the death of Col. Love.

I was son-in-law to Col. Love; do not know any connection that he had with White's stock or Lipscomb's stock.

In the letter of Ware to me, referred to, there was a general complaint about Lipscomb not settling.

(Counsel for complainants here produce and hand to witness a letter dated January 9, 1858, at Brazoria, Texas, and addressed to Rob't J. Ware, at Montgomery, Alabama, and the witness testifies as follows:)

I recognize this letter to have been written by me. I do not remember whether this letter was written in reply to the letter I received from him, which I have stated that I destroyed. I do not remember to have received but one letter from him. I may have written him several.

(Complainants here offer in evidence a copy of the letter referred to in the foregoing letter, which letter is identified by the witness as being the copy referred to. The said letter and copy are offered in evidence and are returned with this testimony, marked "A" and "B" to Joseph Bates' testimony, and identified by the examiner:)

("A.")

BRAZORIA, *July* 9, 1858.

DEAR SIR: Your letter dated twenty-seventh April, at Wharton, came to hand first of May, after night. I suppose you remember the rain that fell about that time, and, besides, you had so much the start of me I concluded that it would be useless for me to under-

take the trip. If you had come by my house or written me sooner to meet you at Wharton, only thirty miles from my house, I would certainly have been prompt. I regret you did not think proper to do so.

I enclose you a copy of Judge Lipscomb's letter to me, so you may see what he thought of the affair, and I hope, Dr., after reviewing the whole transaction, you may become satisfied of the justice of my claim and direct the division accordingly. I feel that equity, justice, and the law is on my side and will urge my interest until I can get it settled.

Judge Lipscomb responded to me, when I inquired of him why he had not urged the division, that he was entirely safe, and told me in what manner, and it may be of service to you to know if you have not closed your business with the heirs.

Please let me hear from you soon, as it may save me some expense and much trouble.

We have fine crops this year and good health.

Yours respectfully, J. BATES.

Dr. Rob't F. Ware, Montgomery.

183 ("B.")

LIVE OAK COTTAGE, *Nov.* 14, 1850.

DEAR GENERAL: Your letter in relation to your land claims placed in the hands of Col. Horton for location came to hand at the time when I was confined to my bed, hence it has not been answered sooner.

I am glad that you mentioned the information you had received in Mobile from James Lyon, because if not contradicted it was well calculated to create an unpleasant feeling on you if such a manifestation of a want of friendship had really ever occurred. I never made any communication, verbally or otherwise, to Mr. Lyon or to any other person from which the inference could be drawn that I had either the wish or believed it to be in my power or that of any one else to deprive you of your share of those lands. According to the receipt of Col. Horton, a copy of which you hold, subsequently to the receipt being given, on the application of Horton & Clements, Mr. White advanced to them a sum of money as their compensation and remarked at the time that if you did not refund to him your share of the sum advanced that you should not have the benefit of the new arrangement, but that he would hold the land that was to be allowed to Horton for locating himself. I consider his declaration as amounting to no more than this, that if you did not think proper to pay the money that he would take the land that was to have been received by Horton as compensation for locating the warrants according to the receipt before mentioned.

In this I perceived nothing wrong, because White would be only taking the benefit of Horton's undertaking and you would be entitled to the balance of your share of the land after deducting the quantity you were to have allowed to Horton. The liability of Horton to you could not be changed without your consent, and, having

made to Horton satisfactory compensation in another way for his trouble, White was justly entitled to the amount that Horton was entitled to from your share.

When Dr. Ware was here, after Mr. White's death, I told what White had said about the money advanced; that I did not know whether you and White had ever settled the matter and advised him to see you on the subject; but I never believed anything was involved, only a choice on your part to pay your share of the expenses of locating to White or to stand to the original contract with Horton, and that White's representatives should receive the land you were to allow for the locating instead of Horton. I know and Horton knows that you paid the one-third of the purchase-money for the land warrants, and that you are equally interested with White's representatives and myself, each of the three having an equal interest, and Horton ought now, according to his agreement, to hand over to you the patents for one-third of the land, less the one-fourth of the same for locating it, and this one-fourth of
184 your third should be held by him for the use of White's representatives. This, I presume, Col. Horton will doubtless feel no hesitation in doing, because it is what he is bound to do.

The patents, I understand, have all been taken out in the name of David White, and consequently both you and myself will be compelled to file a petition against his representatives asking that the title should be vested in us to our shares—that is, if they refuse voluntarily to make the conveyance this condition of the title does not by any means relieve Col. Horton from his obligation to hand over to us our share of the patents. We should obtain possession of our share of the patents and our ulterior course can be a subject of future discussion and decision with us.

I beg you to believe that I never for a moment indulged the unfriendly wish to defeat your rights, and I never could have been stupid enough to believe that it was in my power to have done so had my inclination been so unkind.

Mrs. Lipscomb and myself will expect the pleasure of yourself, daughter, and nephew at our house when you come up to the wedding.

With great respect, your friend sincerely,

ABNER S. LIPSCOMB.

Gen. Jos. Bates.

The language referred to in the letter dated July 9, 1858, wherein I say that Judge Lipscomb responded to me that he was safe, etc., was in effect that Lipscomb had stated to me that he had sold property belonging to himself and White, and that he would owe the White heirs, on a settlement, and that he had the advantage, and that if they would settle fairly with him he would with them. This conversation occurred before I moved down to Brazoria county. I moved down there in 1852. I think it was before I moved down.

J. BATES.

In the Circuit Court of the United States in and for Eastern District of Texas, at Galveston.

ASENATH A. WARE *et al.*, Complainants,
vs.
THE GALVESTON CITY CO., Defendant. } In Equity. No. 155.

UNITED STATES OF AMERICA,
District of Columbia, City of Washington, } *ss:*

Be it remembered that on this eleventh day of October, A. D. 1882, in accordance with the stipulations by and between counsel in the above-entitled cause (which said stipulations are hereto annexed), consenting that the deposition of William H. Goddard, a witness therein named, may be taken as evidence in said
185 cause, in answer to the annexed interrogatories and cross-interrogatories, without commission or previous filing in court, I, Albert A. Brooke, a commissioner of the circuit court of the United States in and for the District of Columbia, duly appointed, commissioned, and qualified as such, did cause to come before me, at my office, number 342 D street northwest, in the city of Washington and District of Columbia, and between the hours of nine o'clock a. m. and seven o'clock p. m. of said days, and on the ensuing days, between the same hours, did examine the said William H. Goddard as a witness in a cause pending in the circuit court of the United States in and for the eastern district of Texas, at Galveston, wherein Asenath A. Ware and others are complainants and The Galveston City Company is defendant; and the said William H. Goddard, of lawful age, and being by me cautioned and sworn to testify the whole truth and to make true answers to all such interrogatories and cross-interrogatories as should be propounded to him, and thereupon being carefully examined, deposed and answered as follows:

In the Circuit Court of the United States, Eastern District of Texas, at Galveston.

ASENATH A. WARE *et al.*, Complainants,
vs.
THE GALVESTON CITY COMPANY, Defendant. } In Equity. No. 155.

It is agreed in the above cause between the counsel of the parties that the deposition of the witness, William H. Goddard, may be taken as evidence in said cause, in answer to the annexed interrogatories and cross-interrogatories, without commission or previous filing in court, by any U. S. commissioner or examiner with same effect and certified and returned as if taken under commission issued by agreement of the parties, subject to all legal objections to the character of the matters testified as evidence.

MANN & BAKER,
GRESHAM & JONES,
M. C. McLEMORE,
Counsel for Complainants.
BALLINGER & MOTT,
Counsel for Defendant.

186 ASENATH A. WARE and Others
vs.
THE GALVESTON CITY CO. } No. 155.

In Circuit Court of the United States, Eastern District of Texas, at Galveston. In Equity.

Interrogatories to William H. Goddard,

A resident of the city of Washington and District of Columbia, to be examined as a witness on behalf of the defendant in the above suit.

First interrogatory. What is your name? Where do you now reside? Have you not been a resident of Galveston, Texas; and, if so, during what period of time, giving dates, and what was your profession, business, or occupation?

Answer to first interrogatory. My name is William H. Goddard. I now reside in the city of Washington, District of Columbia. I was a resident of Galveston from January, 1851, until June, 1881. My profession was that of a lawyer.

Second interrogatory. Have you had any, and what, connection with the Galveston City Company as stockholder, officially or professionally? State fully, giving dates and periods of time.

Answer to second interrogatory. I have been connected with the Galveston City Company as stockholder, director, and counsel. I became stockholder in 1852 or 1853, I think, and so continued till June, 1881. My recollection is that I became a director in the spring of 1854, and I continued to be a director from that time until I ceased to be a stockholder. I was first employed by the company as counsel in the suit of Hardin's heirs *vs.* the company. That was in 1856, I think. Oliver C. Hartley (of the firm of O. C. & R. K. Hartley) and myself (of the firm of Sherwood & Goddard) were the company's counsel in that case by special employment. Hartley died not long after, and I was the company's sole attorney in the case until the firm of Ballinger, Jack & Mott, by retainer as the company's general attorneys, as will be stated in my answer to the third interrogatory, became connected with this and all other suits then pending in which the company was interested. During this period I was the company's sole attorney in the second suit brought by Edgar to recover the whole of the company's land; if not by formal appointment by the board, with the knowledge, approval, and desire of the president and directors. (I think that in this suit T. J. League, Esq., filed a general demurrer and general denial during my absence from the city and as representing me and not by any employment by the company.) O. C. Hartley and myself also filed separate briefs in the supreme court in the first Edgar suit for the recovery of the company's lands, in which the company was originally represented by Jonas Butler, perhaps under the firm name of
187 Jones & Butler or Jones, Butler & Ballinger. This suit had been pending many years, and Butler had retired from the practice of the law and left the city. His brief, an able one,

was on file, but it was of ancient date, and there had been probably later decisions on some of the questions discussed, and there was one point needed elaboration. We were both directors of the company at the time, and, considering the company then unrepresented by any practicing attorney, we volunteered, because of our personal interest in the suit, to file additional briefs for the company. In the report of this case there is some error as to the counsel. I think that Butler's brief is attributed to Joseph & Howard, but whether this is the error I cannot say, it being many years since I saw the report. From the death of Mr. Hartley until the employment of Ballinger, Jack & Mott as the company's general attorneys (see my answer to third interrogatory) J. P. Cole, Esq., who was a retired lawyer, as well as the company's agent, and myself were the legal advisors of the company and did all the legal business not requiring appearance or action in the courts. We charged nothing for such service and were paid nothing for it. Being stockholders and officers of the company, and the board manifesting confidence in us and an entire willingness to avail itself of such convenient service from us and an expectation of it, we both rendered it voluntarily. During this same period I was employed by the company to bring suit to enjoin the Galveston, Houston & Henderson Railroad Company or the parties then in control of it from taking possession of certain blocks of ground belonging to the company. I brought the suit and obtained the injunction. During the same period, whenever suits were brought by or against the company, the board looked to me to say whether I would represent the company therein or not before proceeding to employ other counsel. During the same period I voluntarily filed a brief in the supreme court in the Scott case. Still later I appeared and made an argument in the United States circuit court for the company in a case brought by these same complainants for the recovery of a large sum of money from the company. This was quite recently and while Ballinger, Jack & Mott were the general attorneys of the company. Still later the board has authorized my employment as counsel to argue this last case in the United States Supreme Court, where it is now pending. I do not recall any other fact directly or remotely bearing upon or explanatory of my connection with the Galveston City Company in any capacity or relation or at any time.

Third interrogatory. Please to state, if within your knowledge, the employment of W. P. Ballinger, of Galveston, Texas, and any firm of which he has been a member as lawyer or lawyers by the said Galveston City Company, stating such employment or connection clearly, whether in particular or special cases and what cases or general as attorney or attorneys for said company, and, if general, when and under what circumstances it became so, being exact as to date, so far as within your power, stating, if any, your connection therewith. State what suits were then pending against the company and, in general terms, for what alleged causes of
188 action. If you say there was any employment, state whether the same was without any reservation by said attorneys or with any, and what, reservation as to any employment or business

against the company, and state fully and particularly all that transpired on that subject.

Answer to the third interrogatory. The earliest suit I remember with which the name of W. P. Ballinger or of any firm of which he was a member was or may have been connected as the company's attorney or attorneys was the first Edgar suit already referred to. It was always my impression and the understanding, I think, of the board of directors when I became a member of it that Jonas Butler was in fact the sole attorney employed by the company in that case. How the fact was I do not pretend to state, as the institution of the suit dates far back of my acquaintance with the company's affairs. Neither Jones nor W. P. Ballinger had anything whatever to do with the case after I had knowledge of its pendency, so far as I remember. This suit was finally decided in the company's favor, and some time after Edgar brought a second suit to recover the same land. I have already stated that neither W. P. Ballinger nor any firm of which he was a member had any connection with this second suit until after the employment of Ballinger, Jack & Mott as the company's general attorneys, and except in consequence of that general employment. W. P. Ballinger, or the firm of which he was a member, was the company's counsel in a suit with the city of Galveston involving a portion of "the flats," at the foot of Tremont street. There had been for many years litigation between the city and the wharf proprietors with regard to various portions of "the flats," but I think that the City Company, though interested in the questions involved, was not a party to any of the suits except the one just referred to. The wharf proprietors certainly bore the brunt of the litigation and employed the counsel in all the other suits, the counsel being Allen, Hale & Jones, Butler & Ballinger (if that was the style of the latter firm at the time, as it was long after Mr. Butler's retirement). In the City Company's suit with the city, above referred to, the firm of Ballinger, Jack & Mott (if that was then the style of the firm) was employed as the company's counsel, and so employed because of Mr. Ballinger's long familiarity with "the flats" litigation. The employment was for the particular case and a specific fee.

Another case of the company's in which W. P. Ballinger or the firm of which he was a member was employed as the company's counsel was the suit brought by the heirs of one Scott against the company for a share of stock. In this case Wm. G. Hale was first employed by the company to defend the suit, and he appeared and filed an answer. Some time after (I do not recollect how long) Ballinger, Jack & Mott were employed by the company as associate counsel, and employed for the particular case and for a specific fee, as was also Mr. Hale. So far as I remember, these were the only cases in which Mr. W. P. Ballinger or any firm of which he was a member was employed by the company until the employ-
189 ment of the firm of Ballinger, Jack & Mott as the company's general counsel, and I cannot recollect that he or any firm of which he was a member was ever counsel or attorney for the company in any manner outside of said cases while I was a director or stockholder previous to such employment as general counsel.

The precise date of this general employment I cannot state from memory, but I am certain that it was late in the fall (probably November) of the year in which the State of Texas brought suit against the company in the district court of Galveston county for the recovery of a very large portion of the company's land and a very large sum of money, Judge Mann and George Flournoy, Esq., being of counsel for the State. That suit was brought during my absence from the State, which extended from some time in the spring till some time in November of that year. I was notified of the institution and character of the suit soon after I left the State and while I was in Marietta, O., by letters from the agent (J. P. Cole, Esq.) and M. C. McLemore, Esq.; and I was also notified in the same letters of the employment of the latter by the president of the company as the company's counsel in the case. I at once telegraphed to the agent, urgently recommending the immediate employment of Judge Peter W. Gray, of Houston, as additional counsel for the company in the case, and he was so employed, his employment also including the Scott case, then still pending in the supreme court. On my return to Galveston, in the late fall (November, I think), the board, being informed that Judge Gray's health was in a very precarious condition, and that it was doubtful whether he could be depended upon to be personally present at the trial of the case, authorized and requested me to go to Houston and ascertain and report the Judge's condition. I went, and spent an evening with him at his house. He was evidently quite unwell, and he told me that he did not know but that, in view of the state of his health, he ought to retire from the case. I protested against his doing so at that time and until there might be an absolute necessity that he should. He then expressed a desire that the company should, as a matter of precaution and as a relief to him, associate other counsel with him. I told him if this were done the company would, in any event, consider him the leading counsel in the case so long as he remained in it. I reported this conversation to the board, and it was thereupon deemed advisable to employ other counsel in the case. There were a number of suits against the company then pending, all of considerable and some of very great importance; some of them had been instituted during the summer months, when there was no quorum of the board present to take action in the matter. There was probably not a single year between 1861 and 1880 when there was a quorum of the board in the city from May or June till November, and this was generally known and was likely to be the case indefinitely in the future. The board, therefore, on due consideration of all the circumstances, and to provide against the company being taken at a disadvantage by suits brought during the absence of the quorum, thought it best to employ counsel not merely in the
190 State case, but to represent the company generally, to attend to all its legal business in and out of the courts, including the suits then pending, for a fixed compensation by the year, and an order having that object in view was passed by the board at the meeting, I think, to which I reported as before stated. The order, according to my recollection of its purport, authorized and directed

the president to learn from Messrs. Ballinger, Jack & Mott on what terms they would act as the company's general attorneys and attend to all its legal business, and to report the result to the board for its action. It was either understood at the time by the board or it was afterwards arranged between the president and myself that I should confer with W. P. Ballinger on the subject.

I did so, informing him of the order and asking him whether it would be agreeable to his firm to accept a general retainer to attend to all the company's legal business, including the cases then pending; and, if so, on what terms. He replied that he must first tell me that he had already been consulted by a representative of the heirs of David White with regard to a claim against the company for shares of its stock that had once stood in White's name and had been transferred to various persons and subsequently surrendered to the company and the certificates cancelled. He mentioned the name of the person so consulting him, but it had escaped me until I was reminded that it was Molton. He stated that he had given no opinion on the claim other than that the defense of limitation would certainly be made, and that this point would probably be decided adverse to the claim, and that he had fully explained to Mr. Molton his connection as the company's attorney with that case and how the question of limitation was involved in it, and that he was urging that defense with great confidence. He went on to say that he was to investigate the claim of White's heirs and if he should come to the opinion that they had a fair chance of recovery on the facts of the case and the decision in the Scott case should not be adverse on the point of limitation he was so to inform Mr. Molton or White's heirs, and he expected to be then retained to prosecute the claim against the company; that his firm could not meanwhile make any arrangements with the company or accept any employment by it that would interfere with his right to advise a suit against the company on this claim or to appear against the company in any litigation that might grow out of it; that with his understanding alone could the firm accept a general retainer from the company, but that it would be entirely agreeable to the firm to accept such a retainer on this understanding, if that would be satisfactory to the company. I do not profess to give Mr. Ballinger's language, but merely the substance of what he said on that occasion, according to the best of my recollection and belief. He was explicit in giving me to understand that he must and would reserve full freedom of opinion and action with regard to that one claim, while he was willing to represent the company in all other matters. I stated to him that I was willing, and I had no doubt the board would be,

191 that the employment of the firm as the company's general counsel should be considered as not interfering at all with his rights to prosecute that particular claim and to represent White's heirs in any litigation growing out of it. With this clear understanding, we proceeded to discuss the terms of employment, upon which we came to an agreement; but he remarked to me that he assented to the terms upon the expectation that the employment was not to be for a year or so, but to be of a fairly reasonable de-

gree of continuance. I understood him to mean that the salary of a year or two would not be a fair compensation for the services of the firm in the cases then pending and likely to be disposed of within that period, and I told him that I believed the board meant to secure permanent counsel for the company. I think I suggested to him to put the terms in writing, and that he did so. The interview and the result were duly reported to the board by me or by the president, and the board assented to my arrangement with Mr. Ballinger, and in accordance therewith the firm of Ballinger, Jack & Mott became the company's general attorneys. The suits then pending against the company, so far as I can recall them, were the Hardin suit for some twenty-one shares of the company's stock, the second Edgar suit for the whole of the company's land, the Scott suit for a share of stock—on the result of this suit it was understood that the company's liability for a number of other shares depended; a suit brought by Gen. Waul in favor of Judge Phillips, of Victoria, for a share of stock, and awaiting the result of the Scott case; the State suit for a great portion of the company's land and a very large sum of money, and several suits (I do not remember how many) brought by the various parties claiming, through and under Lipscomb and his first wife, a considerable number of shares of stock on the ground that Lipscomb or the Lipscomb community once owned them or had an interest in them, but that the certificates had been transferred, surrendered, and cancelled without authority. I do not remember fully or precisely the particulars of these several suits, but I think that in one or more of them a discovery was sought from the company of the history and status of all the shares and certificates of stock with which Lipscomb ever had any connection.

Fourth interrogatory. Have you read copies of the bill and answer to this suit?

Answer to the fourth interrogatory. I have read what I take to be printed copies, in pamphlet form, of the bill and answer in this suit.

Last interrogatory. Do you know or can you set forth any other matter or thing which may be of benefit or advantage to the parties at issue in this cause or any or either of them, or that may be material to the subject of this your examination or the matters in question in this cause? If yea, set forth the same fully and at large in your answer.

Answer to the last interrogatory. I do not know or remember anything of benefit or advantage to any of the parties in this cause or material to the subject of examination not already stated by me or not called forth by the cross-interrogatories and to be stated
192 by me in answer thereto, unless it be the fact implied in what I have already stated that the Galveston City Company, during the entire period of my connection with it, never had any counsel in its employment, except as specially employed in special cases and for specific fees, until the firm of Ballinger, Jack & Mott was employed as general counsel in the manner and at the time stated by me in my answer to the third interrogatory; that the board was

always opposed to the employment of counsel by the year, and at last resorted to such employment very reluctantly and mainly, if not solely, that the company, through counsel selected by a full board, might be prepared for any emergency requiring prompt action that might occur during the absence of a majority of the directors from the city. If anything that may be stated by me in answers to the cross-interrogatories be deemed irresponsive to those interrogatories and be relevant and admissible in answer to this interrogatory, I ask that it be taken as stated by me in answer hereto.

Cross-Interrogatories of W. H. Goddard.

First cross-interrogatory. Do you know that from some time in 1869 to 1876 or 1877 Wm. P. Ballinger held all or any papers, letters, or memoranda that the heirs of David White, complainants, had bearing on the question as to what shares of the capital stock of the Galveston City Co. David White had owned, and as to whether David White's heirs owned or had a right to any of said shares, and that complainants, through their agent, T. J. Molton, had counseled and advised fully and at great length with Wm. P. Ballinger as to whether or not papers and memoranda found among private papers of Abner S. Lipscomb after his death gave a *course* of action or right to a bill of discovery against the Galveston City Company, and as to whether or not, by the presumptions arising from said papers left by Lipscomb, there was ground to require the Galveston City Company to produce the evidence of all said shares having been duly transferred before the death of David White? And do you know that during the time said Ballinger held said papers he was under the employment of complainants to take such legal steps as were necessary for enforcing or protecting their rights as to any stock aforesaid? And do you know that Wm. P. Ballinger, who is solicitor for the Galveston City Company in this suit and is setting up defense of laches and *state* demand and lapse of time, did repeatedly assure complainants, during the time he represented them, as to the very identical subject-matter of this suit, that they would not be in any way prejudiced by his delay to bring suit? If you answer that you know anything as to the facts, matters, and things inquired about, then when did you first become acquainted therewith? Did you know the same when, as a director of said company, you arranged with W. P. Ballinger to represent this suit? And were you not advised that W. P. Ballinger had had access to papers of complainants, and full statements had been made to him
193 of all facts bearing on this case by complainants at time of his employment by defendant or instructions by defendant to him to defend this suit under his general employment? Answer fully.

Answer to first cross-interrogatory. I do not know anything as to the several facts, matters, and things inquired of in this interrogatory. I never, as a director of the Galveston City Company, arranged with Mr. Ballinger to represent this suit. My arrangement with him was with regard to the general employment of his firm as the

company's counsel, as stated in my answer to third direct interrogatory. As this suit was brought by other counsel, he came into it for the defendant under that general employment and without any additional fee or increase of salary. Perhaps, at the time of my said arrangement with him, he informed me that he had in his possession the abstract furnished White's heirs by the company's agent, but I have no recollection that he did. Some time after he came (by virtue of the general employment) into the cases brought by parties claiming under and through Lipscomb and his first wife, Mr. Ballinger told me that he expected to prove that Lipscomb's interest in the company's stock was his separate property, acquired by him before he went to Texas; but I do not remember that he either described or showed to me any papers whatever. I repeat, that no one of the facts, matters, and things inquired of in this interrogatory is now known to me or ever has been, so far as I can recollect, unless it is embraced in my answer to the third direct interrogatory, and I refer to that answer as containing all I can state on these various matters or any of them, and I ask it to be taken as a part of my answer to this cross-interrogatory, so far as it may be relevant and admissible.

Second cross-interrogatory. Do you not know that in 1869 T. J. Molton, of Montgomery, Alabama, came to Texas from Alabama as agent of the estate or heirs of David White, and that he made repeated oral applications to the agent of the Galveston City Company, at the office of the company, for such access to the books and records of the company as would give all the facts and information shown thereby as to the shares of stock of said company owned by David White in his lifetime and which the company claimed and represented to *be* the legal representatives of his estate had been duly transferred during his life? And do you not know that T. J. Molton made formal written application, while he was in Galveston, to the company of which you were then a director for such access to records of the company? If you state you do not know and never knew of such written application to the company for said information, then state fully how it was that you, as a director, never knew. And if you state that you knew of said written application, then state whether you do not know and you did not know when W. P. Ballinger appeared in this cause for defendant, that he, W. P. Ballinger, supervised and assisted T. J. Molton in preparing the original draft or form of said application, and that part of the original draft of said application is in the handwriting of the said W. P. Ballinger.

Answer to second cross-interrogatory. I do not remember
194 when, but it was some considerable time before my interview with said Ballinger, mentioned in my answer to the third direct interrogatory, a gentleman called at my office and stated his name (Molton, I think), and probably his residence, though I do not remember it. He said he represented David White's estate or heirs, and that he had applied to the agent of the company for permission to inspect the company's books and files, for whatever information they might furnish as to the shares of stock once stand-

ing in David White's name, and that his application had been refused. The latter part of this statement was subsequently confirmed by the agent. Nothing was told me and nothing had I ever heard of any claims or representations ever made by the company to the legal representatives of White's estate that the said shares of stock had been duly transferred during his life, or of any representations whatever other than in the form of a written abstract or statement said to show every share of stock that had ever belonged to White or stood in his name, and what had subsequently become of it, and said to have been furnished by the company's agent to White's representatives or heirs, at their request. So far as I now remember, this abstract was never seen by me, and was known to me only by report. My impression is, but I have no distinct recollection of the fact, that after his interviews with me, for we had two, as hereafter appears, the gentleman made a formal written application to the board, of which I was a member, for access to the records and files of the company. If there was such an application I do not know, and to the best of my recollection I never have known that W. P. Ballinger supervised and assisted Mr. Molton in preparing the original draft or form of it, or that part of the original draft is in said Ballinger's handwriting. If any part of the application is in his handwriting I may have seen and recognized the writing; but I do not recollect anything of the sort.

Third cross-interrogatory. Do you know that after the death of Abner S. Lipscomb there were found among his papers a receipt as follows:

"I have received this day from A. S. Lipscomb thirty-one shares of Galveston City stock, which I promise to return to him whenever thereunto requested, value received, March 4, 1842.

"(Signed) JAMES LOVE."

Also a paper purporting to be a copy, undated, as follows:

"For value received, I do hereby assign unto James Love all my right, title, and interest in and to fourteen (14) shares of the stock of the city of Galveston, Texas, on which has been paid by — one thousand dollars on each share.

"ABNER S. LIPSCOMB.

"Witness:
"JOHN P. BORDEN."

(Nos. 280 to 293.)

Also a written order in handwriting of Abner S. Lipscomb, and signed by him, as follows:

195 "WALNUT BLUFF, *January* 9, 1844.

"DEAR SIR: Please deliver to Dr. Rob't J. Ware, executor of David White, sixteen shares of Galveston stock, and oblige your friend,

"ABNER S. LIPSCOMB.

"To Col. James Love."

If you say that you know that these papers or any of them were found among said papers, then state from whom, when, and how did you know this.

(A) If you state that you do not know that such papers were among the papers of Lipscomb, then state whether or not you ever in any way, and what way, heard of these papers, and from whom did you hear of them.

(B) Were you in Galveston on or about or after March 18, 1881, when this suit was filed, and, if yea, did you not have one or more conversations with W. P. Ballinger as to the bill herein and the matters it set out, and did not W. P. Ballinger show you copies of said papers hereinbefore set out in this interrogatory, and if he did not show them to you did he not tell you of them or refer to them or to their contents?

(C) Do you not know that W. P. Ballinger had copies of said papers or writings herein set out placed in his hand by T. J. Molton, agent of complainants?

(D) Has the City Company ever had any letter or written instrument or any information or knowledge in any way showing that James Love held sixteen shares of the stock issued to David White under any promise, agreement, or obligation to return same or same number of shares to A. S. Lipscomb or to David White's estate?

Answer to third cross-interrogatory. I do not know that there was found among Abner S. Lipscomb's papers either the receipt or the paper or the order referred to in this interrogatory.

(*a*) I do not remember having ever heard of any one of said papers.

(*b*) I was in Galveston at that time, and when I was in Mr. Ballinger's office one day on other business he referred to this bill as having been then recently filed; asked me if I had seen it, and, on my replying that I had not, pushed towards me what he said was a copy of it, lying on his desk, and asked me to take and examine it. I declined to do so, and the subject was dropped. This is the only conversation I remember to have ever had with W. P. Ballinger as to the bill or the matters it sets out. He did not show me any copies of any of the papers set out in this interrogatory, nor did he tell me of them or refer to them or their contents.

(*c*) I do not.

(*d*) It never had, so far as I remember.

Fourth cross-interrogatory. From your familiarity with the records of the Galveston City Company and your knowledge of Abner S. Lipscomb and James Love and their character, and from said receipt and order set out in the third cross-interrogatory, do
196 you not believe that Lipscomb loaned Love sixteen of the shares of the David White stock (or the certificates of sixteen shares), and that Love made way with same or never accounted to Lipscomb or heirs or estate of White therefor? If you answer that you do not so believe, then——

(*A*) Have you not heard J. P. Cole, agent of the company, state or say that it was his belief or theory that Love got sixteen shares of

the stock from Lipscomb and never returned them, or statement or words to that effect?

(*B*) Have you ever heard W. P. Ballinger say anything as to his knowledge, belief, or theory as to James Love having made way with or borrowed and never returned part of the stock owned by David White or issued to David White and held by Abner S. Lipscomb?

(*C*) Have you ever heard W. P. Ballinger say anything, and, if so, what, as to James Love having had anything to do with or in any way connected with said shares or any shares owned by or issued to David White; and, if yea, what did he say?

(*C*) What relationship was there between James Love and W. P. Ballinger and where did said Love live from, say, 1869 to time of his death, and what year did James Love die? And if you say you do not know what year he died, then approximate thereto as near as you can.

(*D*) Is not the James Love, the uncle of W. P. Ballinger and for many years president of the Galveston City Company, the same James Love mentioned in case of Combs & Hodge, reported in 21 Howard, 397 *et seq.*, and in case of Hodge & Combs, 1 Black (Sup. C't U. S. Rep't), 192 *et seq.?* If you say that you do not know whether or not he is the same Love, then state how long he lived in Texas; how long you knew James Love. Did you know any other James Love in Texas during that time, and could the other, if any, have been the one referred to in said reports? Did you not hear said suits talked of or spoken of while pending, and was it not understood and commonly known that the James Love mentioned in said opinions was the one who had been president of the City Company, the defendant?

Do you not know from common report that the Love mentioned was president of said company at one time?

Answer to fourth cross-interrogatory. While the various matters and things referred to in this interrogatory lead me to believe that Lipscomb loaned Love thirty or thirty-one shares of stock, sixteen of which had probably stood in White's name, they do not produce in my mind the belief that Love made way with any part of the shares or never accounted to Lipscomb therefor. It would take other facts or evidence to lead me to such a belief.

(*a*) I have not, to the best of my recollection and belief.

(*b*) I have not.

(*c*) No; nothing at all.

(*c*) I have always understood, but it is not within my own knowledge, that James Love was W. P. Ballinger's uncle. I think that said Love lived during the latter years of his life on the
197 northwest quarter of the out-lot, on the southeast quarter of which was W. P. Ballinger's residence. I do not know the period of said Love's occupancy of said house. I do not know the date of his death and prefer not to guess at it, as the exact date must be susceptible of easy proof.

(*d*) I have no recollection of ever having read or seen the reports of the cases herein referred to, and I do not know whether the

James Love mentioned therein was the James Love the uncle of W. P. Ballinger and at one time the president of the Galveston City Company. I lived in Texas a little more than thirty (30) years, and knew, though slightly, James Love from 1851 until his death, and never knew but one James Love in Texas. I do not remember having ever heard said suits spoken of while pending, and cannot say what was understood and commonly known with respect to the James Love mentioned in said opinions being the one who had been president of The Galveston City Company, the defendant. I do not know from common report that the Love mentioned in said reports is the one who was president of said company at one time.

Fifth cross-interrogatory. Have you ever seen the indorsements on the twenty-one shares or certificates (trustee) of said shares sued for in the cause? Have you ever examined said certificates or the signatures or writing on the back of said certificates? If yea, where did you first do so, and with whom, and for what purpose? If you answer you have never seen or examined the writing or signatures on back of said certificates of said share- or any of them, then please explain why you, a director and large stockholder and lawyer, did not examine the same when this suit was filed.

Answer to fifth cross-interrogatory. I think I saw the indorsements on the certificates (trustee) of all the shares sued for in this cause, and examined the writing on the back of each of them at an early period of my connection with the company (probably soon after the institution of the Hardin suit, in 1856, and in consequence of that suit) and with Oliver C. Hartley, the agent of the company, being present and assisting when asked. Hartley and I examined every certificate of a share of stock then on file in the company's office, including the certificates herein referred to, if they were then on file, as I think they were. Our purpose was to ascertain if there was anything in the past history of any shares of the company's stock, so far as could be gathered from the company's records, to affect the value of the stock. It did not occur to us to extend our examination (and we did not) to any facts outside of the company's records, to investigate, *e. g.*, whether there were any forged signatures or whether, where a transfer purported to be by an attorney-in-fact, the principal was dead at the date of the transfer. I think that in every case of a transfer by an attorney-in-fact we called for the power of attorney, and that the agent either produced the power or informed us that it was a general power, duly recorded in the county records. We intended to be thorough in our examination, and we thought that we were.

Sixth cross-interrogatory. Were you not a director and
198 large stockholder in The Galveston City Company, the defendant, until after this suit was filed? Do you now own any stock in said company; if yea, how many shares?

Answer to sixth cross-interrogatory. I was a director and the owner of four shares of the stock in said company until after this suit was filed. Six shares stood in my name, two being held merely as security for the payment of money due me. I own no stock in

said company now, though it is possible that one of the two shares just referred to has not yet been transferred by my attorney-in-fact, A. R. Campbell, Esq., to the owner. I presume that it has been, as the money has been paid.

Seventh cross-interrogatory. Is it not true that the refusal of the company to allow any one, for or in behalf of the estate or heirs of David White, to see the writing on the back of the trustee certificates of the stock issued to David White, and which writing the company calls "due transfers" of the shares, largely owing to you and your influence in the directory? Were you not opposed at all times to the complainants knowing what was the form or want of form of the so-called transfers of and on said trustee certificates?

Answer to seventh cross-interrogatory. I do not remember any such refusal by the company as is herein assumed, for I do not remember what action, if any, was taken by the board on any application by Mr. Molton. Possibly, as he left the city before the board met, the application was not presented by the agent, or was presented with the statement that Mr. Molton had left the city, and it was not read or formally acted upon; but I have no recollection about this. It is true, in one sense, and yet not true in another, that the refusal of the agent to allow an inspection by Mr. Molton of the said certificates and the writing on the back of them without the permission of the board was owing (I cannot say how largely) to me and my influence in the directory. I will explain: In the course of my preparation of the defense in the Hardin suit, after Mr. Hartley's death, I had to investigate facts outside of the company's records, connected with the sales, assignments, and transfers of many shares of stock, in 1839–'40, if I recollect aright, as the suit was brought to recover some twenty-one (21) shares alleged to have belonged to William Hardin at his death (in 1839, I think), and to have been illegally and fraudulently transferred before or soon after his death to various persons, the certificates being cancelled and others issued in their stead, and all but two having been finally surrendered to the company, and being still in its possession. Minority was relied upon to prevent limitation. The suit involved the legality of probate sales at that early day, of which it was doubtful whether the probate law then in force afforded any presumption. It involved also the legality of transfers under powers of attorney, the fact whether Hardin had sold and delivered two shares, the certificates of which had been surrendered during his lifetime, without any written assignment or transfer, and various other matters *in pais* or matters *dehors* the company's records and the probate records.

199 I succeeded in making proof (by deposition now on file) of the main facts I wished to prove, as several of the parties cognizant of them happened to be still living and their place of residence known. But there were some facts I wished to prove by three witnesses (Pine, Wheeler, and Kelton), and after a diligent and long protracted inquiry I could find no trace of two of them, and I ascertained the third to be insane or dead. At this time any one who saw fit to do so, whether a stockholder or not, whether having any claim against the company or merely intent, as a professional

speculator in litigation, upon hunting up chances of a lawsuit against the company or against persons deriving titles to lots or stock through the company, had free access to the company's books and files and rummaged them at his pleasure, to the manifest defacement and injury of the company's valuable records and at the risk of the mutilation or abstraction of its valuable papers.

The Hardin suit itself had been hunted up, as I personally know, by no one of the heirs of William Hardin. Impressed, by experience in that suit, as above detailed, with the great hazard, hardship, and expense which the company had incurred in that case and might be subjected to any time and any number of times in the future by being called upon to employ counsel to defend suits thus originating and to make proof of ancient facts to which there might be no living or accessible witness in support of the validity of ancient transfers, perfectly legal on their face, or defective in form, but perfectly legal in point of fact, I brought the matter to the attention of the directors and suggested the propriety of some restriction upon the free and indiscriminate access to the company's private records and files that had been tolerated up to that time. I proposed an order prohibiting inspection of the company's books and files to any one but a stockholder. Some of the directors thought that this would not be effectual, as any one seeking to use the company's private papers and books for the purpose of hunting up a speculative suit against the company or against purchasers of lots or stock could easily get a share transferred into his name for the purpose or buy a share at the market price of that day, and so evade the spirit and object of the order. Two amendments were offered, neither by myself, bringing the proposed order into its present shape. The power of the board to put any restriction upon the right of a stockholder to inspect the company's books and files was discussed, but the view prevailed that the requirement of a previous application to the board for permission was not an unreasonable restriction and could work no hardship, and so also as to the examination of the books in the presence of the board. Accordingly the order was passed in its present form. Now, so far as I was instrumental in effecting the passage of this order as thus detailed, and no further, was the refusal of the company's agent, under the terms of the order, to allow an inspection by Mr. Molton of the certificates referred to and the endorsements thereon owing to me and my influence in the directory.

200 I was not opposed at all times to the complainants knowing what was the form or want of form of the transfers of our said trustee certificates. On the contrary, the fact is as follows: When Mr. Molton informed me, as already stated in my answer to the cross-interrogatory, that the agent had refused to allow him to inspect the company's books and files I asked him if the agent had explained to him the reason of his refusal. He replied that the agent had informed him of the order already referred to and why it was passed, and had told him that he (Mr. Molton) would have to make application to the board, in compliance with the terms of the order. He went on to say that his stay in the city would be very short (I think he said he would leave next day or the day after);

that the agent had informed him there would be no meeting of the board before his departure; that he wished the order to be relaxed or not enforced in this instance, and had been led (he did not say by whom, I think) to believe that with my consent its enforcement would be waived, and that it was the object of his call upon me to obtain through me, if possible, an inspection of the said certificates and whatever related thereto without waiting for the action of the board. I think that he referred during the conversation to the abstract of the White shares and their transfers furnished to White's heirs as being still in their or his possession. Being of the impression, derived from the examination made with O. C. Hartley, as already stated, that there was no substantial defect, even if there might be some informality, in the assignments or transfers of any of the shares of the company's stock, including the White shares, and that an inspection of them by any one seeking in good faith to ascertain the facts would bring him to the same opinion, I felt quite disposed that Mr. Molton should see what he wished to see, and I told him that while I presumed White's heirs already had in the abstract furnished them a correct history of all the shares that had stood in White's name, and that nothing in the company's office would add anything material to their information, and while I had no more power or influence than any other director to procure him an inspection of the company's files and books without the permission of the board, I was individually willing that he should have that privilege and I would call on the agent and see if he would feel authorized to depart from the strict terms of the order in view of Mr. Molton's brief stay in the city. I did not then know or suspect and had never heard, so far as I can remember, that there was any charge or suspicion of fraudulent conduct on the part of Lipscomb or Love or any one else in connection with any of White's shares, and I supposed the only matter of inquiry was whether the shares had passed out of White's name and ownership by transfers substantially valid on their face. I may have been told by Mr. Molton that the abstract showed that some shares sold and assigned by Lipscomb as White's attorney were renewed to the purchaser after White's death. If this was stated to me it did not suggest to my mind any fraud, or even any mistake or irregularity, both because of Lipscomb's high character and because of my knowledge of the fact that certificates were often held
201 by the purchasers and passed from hand to hand some time before being brought into the company's office for renewal or surrender. So, too, the fact, if it is a fact, though I do not now recall it and did not, I presume, at the date of my interviews with Mr. Molton and the agent, that Lipscomb assigned to himself any part of the shares that stood in White's name never suggested to me or to Mr. Hartley, so far as I remember, any fraud on the part of Lipscomb. I went to the company's office and had a talk with the agent on the subject of Mr. Molton's request, expressing my willingness that Mr. Molton should be gratified and my opinion that he would be convinced by an inspection of the company's books and files that there was no real foundation for any claim against the

company. The agent promptly responded and with a good deal of emphasis that he had no discretion in the matter, but was bound by the terms of the order and he could and would make no exceptions whatever. It was in this interview that the agent confirmed Mr. Molton's statement to me that he had applied to the agent for and been refused permission to examine the company's books and files. I reported the result to Mr. Molton when he called again at my office at an hour appointed at the close of our previous interview. He stayed but a few moments and I did not see him again, nor did I, so far as I now recollect, hear anything more of the claim of White's heirs until my interview with Mr. Ballinger already mentioned by me and I supposed it had been dropped.

Eighth cross-interrogatory. What documents or papers had the Galveston City Company in its possession when this suit was filed in any way connected with said shares of stock owned by David White and in any manner connected therewith? Have you ever made examination as to what there is in the office of the City Company bearing on the transfers of the shares of the stock issued by the company to David White or owned in any manner by said White? State fully what you found, itemizing and describing all papers, memoranda found or seen by you, bearing on ownership or transfers of said stock. The company, the defendant, claims that it has nothing in its possession and never had throwing any light on or germain to the transfers of the sixty-seven shares of stock issued to David White or Lipscomb except the endorsements on the sixty-seven trustee certificates.

Answer to eighth cross-interrogatory. No documents or papers whatever, so far as I know, except the certifi-ates themselves, with the endorsements thereon, and possibly (but this I cannot say) a copy of the power of attorney to Lipscomb. I have already stated in full my examination of what there was in the City Company's office bearing on the transfers of all the shares of the company's stock, including the stock issued to David White or in any manner owned by him. I found and I saw nothing bearing on the ownership or transfer of said stock, so far as I now remember, except the certificates themselves and the endersements thereon and whatever may have appeared in the company's transfer book and stock ledger. I presume it is not intended I should itemize the cer-
202 tificates and endorsements or any part of the contents of said two books; and if it is, I am utterly unable to do so.

Ninth cross-interrogatory. While you were a director in said company had not the defendant or some one person or some firm, as servants, agents, employés, officers, or attorneys-at-law for defendant, some, and what, agreement or agreements, bond or bonds, account or accounts, book of account or books of account, cash book or cash books, or some other book or books, letter or letters or copy of letter or letters, bill or bills, receipt or receipts, voucher or vouchers, memoranda or memorandum, or some, and what, other document or documents, paper-writing or paper-writings, or some, and what, copy or copies or extract or extracts from or of the several particulars aforesaid or one, and which, of them, referring or relat-

ing to the several matters hereinbefore stated, or to some of them, and would not the truth as to the fact and allegations in the bill in this suit or some, and which, of them appear by such particulars if some were produced? As to the particulars inquired about, please set out a full and perfect list and schedule of all such particulars, distinguishing those which were in possession of the defendant from those which once were but are not now.

Answer to ninth cross-interrogatory. According to the best of my knowledge, recollection, and belief, while I was a director of said company neither the company nor any of the persons described or characterized in this interrogatory ever had any one of the several things therein particularized or included or referred to that had any reference or relation to any part of the matters stated in these interrogatories or that would or by any possibility could cause to appear the truth of any allegation in the bill impeaching the validity of any transfer of any share of stock that ever stood in David White's name on the ground of fraud or misconduct on the part of any person whomsoever. Of course there are allegations in the bill as to the issue of shares to David White and the transfers of said shares and cancellations of the certificates, whose truth (aside from charges of fraud and illegality) appears from the company's files and books, as admitted in the answer. I cannot understand this interrogatory as intending to embrace such allegations or those referring to deaths and wills and heirship and the like and as requiring me to answer to each of them seriatim and to schedule everything or anything relating thereto. I have answered the interrogatory in the sense in which I understand it and answered it as fully as I can, and it is impossible for me to answer it in any other way. I will add, to the best of my knowledge, information, and belief, the company now has in its possession every document and paper and memorandum and book entry relating to the ownership and transfers of the White shares that it ever had.

Tenth cross-interrogatory. Is it not the fact that the Galveston City Company has never had a litigated suit since 1851 in which W. P. Ballinger was not of counsel? How long were you director in said company and (*a*) what suit did the company ever have during that time in which W. P. Ballinger was not of counsel for
203 the company? And (*b*) did the company during the time you were a director ever employ any lawyer or lawyers in any litigated matter without consulting with W. P. Ballinger as to such employment? And (*c*) was there ever any written contract of employment by the company with W. P. Ballinger? And (*d*) did the company ever pay W. P. Ballinger as attorney by the year; and, if so, for what years and what amount per year? And (*e*) did the company, the defendant, ever pay any fee to any lawyer after 1865 for any counsel or advice in any matter in which W. P. Ballinger was not of counsel and was not advising as to? If you say that W. P. Ballinger was not of counsel for the company in all cases, state what the cases were and reasons why he was not so employed.

Answer to tenth cross-interrogatory. It is not a fact. I was a director twenty-seven years.

(*a*) The railroad injunction suit referred to in my answer to second direct interrogatory now occurs to me. Even after the general employment of Ballinger, Jack & Mott as the company's attorneys Willie & Cleveland represented the company in a tax suit against the city of Galveston, and I think Mr. Ballinger had no connection with the case in consequence of the view he took of it.

(*b*) Yes; in every instance in which any counsel other than W. P. Ballinger or his firm was employed by the company. He was never consulted and he never advised respecting such employment in a single instance, so far as I have ever known.

(*c*) As stated in my answer to third direct interrogatory, I think Mr. Ballinger handed me in writing the terms on which his firm would act as the company's general attorneys under our agreement, already stated, and that the board, by order entered in its minutes, assented thereto. I think that usually when an attorney was employed by or for the company the fact and terms of employment appeared in the minutes, though sometimes they may not have done so. I know of no written contract in any case other than by an order entered in the minutes and a copy thereof furnished the attorney by the agent.

(*d*) After the employment of Ballinger, Jack & Mott as general attorneys, as stated in my answer to third direct interrogatory, but never before, the company paid them, as attorneys, by the year as long as I was director. At first the annual payment was some $1,200—I forget the exact amount. Afterwards (I can't say when) it was reduced by agreement to $700 or $750, and still later (I can't say when) to $500, which was the salary of the firm when I ceased to be a director. I know nothing of payments since then.

(*e*) Yes. I think it was after 1865 the company paid me a fee in the Hardin suit, in which Mr. Ballinger was not then of counsel or "advising as to." I refer to my answer to third direct interrogatory, and repeat the same, so far as it is material or relevant to this interrogatory; and I further answer that W. P. Ballinger never was of counsel in the railroad injunction suit referred to in my
204 answer to second direct interrogatory; also that he was not of counsel for the company in the Hardin suit or the second Edgar suit, and was not expected or intended by the company to be, until, owing to the long pendency of both suits, he came into them in consequence of the general employment of Ballinger, Jack & Mott as the company's attorneys, as stated in previous answer; also that he was not of counsel for the company, and was not expected or intended by the company to be, in the Scott case until some time after the employment of other counsel in the case and in consequence of dissatisfaction with such other counsel; also that he was not of counsel for the company, and was not expected or intended by the company to be, in the State case until some time after the employment of other counsel and in consequence of the ill health of P. W. Gray, as already stated by me. He would not have been of counsel for the company in any case, except, possibly, the suit with the city for a portion of "the flats," at the foot of Tremont street, if I had continued to take charge of new cases in the court

after 1865. The fact that he was not originally employed in the case mentioned was owing to the preference of a majority of the board for other counsel.

Eleventh cross-interrogatory. Please examine Exhibit "A," attached hereto, and state whether or not W. P. Ballinger ever advised you or your directory of Galveston City Company of or as to the matters set out in or referred to in said exhibit concerning the claim or claims therein referred to for stock. Did you, at any time between 1869 and 1873 or since, know that he had any such correspondence?

Answer to eleventh cross-interrogatory. I have already stated, in my answer to third direct interrogatory, all that W. P. Ballinger ever advised me of or, so far as I know, ever advised the directory of the Galveston City Company of with respect to the matters set out or referred to in Exhibit A, attached to the cross-interrogatories, or concerning the claim or claims for stock therein referred to, and I beg to refer to said answer, and adopt as my answer hereto so much thereof as may be relevant. At no time in 1869 did I know of any such correspondence, nor at any time since before seeing this Exhibit A, but I knew and the directory must have known, through W. P. Ballinger's communication to me, as stated in my answer to third direct interrogatory, that Ballinger, Jack & Mott had to do with the investigation of the claim of White's heirs to stock and would prosecute the claim against the company, notwithstanding their general retainer, if they could see a fair chance of recovery.
* * *

Twelfth cross-interrogatory. Is not J. P. Cole, the agent of the company and who has held that office since 1854, a careful, painstaking office man? What has been his yearly pay or salary? Has he not devoted his whole time to his office and his official duties, and (*a*) are not the books and papers of Galveston City Company carefully and methodically kept and arranged? (*b*) Have letters to the company been kept? If yea, (*c*) how have they been kept? Are they bound or pasted in volumes and indexed, or are
205 they filed, and how filed and where, in the office? (*d*) Are letter-press copies of letters from the company or the agent on business as to the office or connected therewith kept? If you answer that neither letters to the company nor copies from company or its agent are kept, please state why they have not been; declare fully.

Answer to twelfth cross-interrogatory. J. P. Cole, who is still (I believe) the agent of the Galveston City Company and who has been since 1854, is a careful, painstaking office man. His salary has varied from time to time with changes in the currency and in the business and condition of the company. I cannot be more definite. I cannot say that he has devoted his whole time to his office and official duties. During his agency he has been county commissioner, probate judge, and mayor or recorder of the city of Galveston and served faithfully in all those positions.

(*a*) Yes; to the best of my belief.

(*b*) The company received very few letters. All letters received by it and deemed of importance have been kept, I think.

(*c*) Letters so kept were pasted in letter files or volumes, I think, but am not sure. I do not remember that they were indexed. If there were powers of attorneys or other documents than letters relating to any particular matter, they were kept in separate envelopes, and, in that case, letters relating to the same matter, if any there were, were probably kept in the same envelopes, but I have no recollection of having occasion to look up any letters to the company, and I cannot speak more positively of the manner in which they were kept.

(*d*) I think that the agent kept letter-press copies of all letters that were deemed of any importance, and probably of all letters written by him on the business of the office or connected therewith, and I know of no letters ever having been written on such business by any officer of the company but the agent. If any letters to the company from any person or a copy of any letter from the company or its agent to any person has not been kept, it was not kept, according to the best of my belief, for the sole reason that it was deemed of no importance whatever.

Thirteenth cross-interrogatory. Is it not a fact that there have been a letter or letters, writing, or memoranda in possession of the company or its agent or in its office connected with, bearing on, or referring to the shares of stock owned by David White or issued to him, and (*a*) is it not the fact that some have been destroyed or removed from the Galveston City Company's office, and (*b*) was not this done on the same ground that actuated the company or its directory in refusing any access to or information from its records to parties claiming an interest therein, and (*c*) are there not some nine or eleven certificates of stock issued by the trustees called trustee stock still outstanding and which has never been renewed and which are supposed to have been lost or destroyed, and (*d*) what steps have the company taken to advise the owners of the shares represented by said certificates of their ownership, and what steps have
206 they taken, and when and how, to find out who are the owners of said shares? (*e*) What are the numbers of said shares or trustee certificates? (*f*) Out of what book were they issued? (*g*) To whom were they issued? Have you any memoranda as to those certificates; and, if not, did you ever have?

Answer to thirteenth cross-interrogatory. No, it is not, so far as I know or remember, excepting Mr. Molton's written application already referred to, if he made one.

(*a*) Nothing whatever connected with, bearing on, or referring to the shares of stock owned by or issued to David White has ever been destroyed or removed from the Galveston City Company's office, so far as I have ever known or heard of or had reason to believe or suspect. I am very confident that no such destruction or removal has ever occurred.

(*b*) No answer to this.

(*c*) I believe there are such outstanding certificates.

(*d*) Not long after my connection with the company (I can't state

precisely when) the board, being anxious that all the outstanding trustee certificates should come in and be "renewed," caused notices to the unknown holders of them to be published in the newspapers that were supposed to be most likely to reach them, namely, some leading newspaper published in each of the cities, I think, of New Orleans, Mobile, Richmond, Baltimore, Philadelphia, and New York, and probably also in some Galveston newspaper of that day, but I do not recollect as to this. Many of the early stockholders lived in and near the cities named, and the unknown holders of the outstanding certificates were thought by the board to be non-residents of Texas, in all probability. The notices required the holders of the trustee certificates to come in and surrender them for renewed certificates. I think that after the publication of these notices a number of the trustee certificates came in for renewal. I think also that a few years after notices were published in the same papers again calling for the surrender of the trustee certificates for "renewal," and with a view to bring them all in, if possible, stating that only holders of renewed certificates would be permitted to vote in stockholders' meetings or to receive dividend on their stock. In course of time all the trustee certificates came in except nine, I believe, that are still outstanding. I may mistake as to the notices having been published and republished in all the cities named, but I think they were in all or most of them. The company knew of no other steps it could take to bring in these certificates, and it took no other, so far as I now remember.

(*e*) I do not know.

(*f*) I do not remember.

(*g*) I do not know. I have not. I do not recollect that I ever had.

Fourteenth cross-interrogatory. Have you never seen, read, or heard read any letter, notice, or written communication from Abner S. Lipscomb to the Galveston City Company, its agent or agents, its president, its directory, or any director as to any share or
207 shares of stock originally issued to David White or shares owned by White and represented by Lipscomb?

Answer to fourteenth cross-interrogatory. I never have, according to the best of my recollection.

Fifteenth cross-interrogatory. Is there now or was there ever any paper or writing in the office of Galveston City Company showing or going to show that Abner S. Lipscomb ever left on deposit with the company or its agent or its president or any officer of the company any certificate or certificates of the stock of the company to be kept for him or subject to his order or to be kept for David White or his representatives? Declare fully; and

(*A*) Is it not a fact that in the early years of the company it was quite usual to leave certificates of stock with the company for safe keeping?

Answer to fifteenth cross-interrogatory. There is not now and never has been, so far as I know or remember; and

(*a*) It is not, or if it is I never heard of it, so far as I can recollect.

Sixteenth cross-interrogatory. Have you received any letter or letters from W. P. Ballinger or J. P. Cole as to this suit or matter

or thing connected therewith or any memoranda or writing of any kind as to same? If yea, attach all of the same or copies certified as copies by the officer taking your deposition.

Answer to sixteenth cross-interrogatory. I have received nothing whatever from J. P. Cole as to any matter connected with this suit and nothing as to the suit itself, except a letter of January 7, 1882, asking me to name the fee I would charge for arguing the case between the same parties now pending in the United States Supreme Court, and also what additional fee I would charge to argue this case whenever it comes up to the Supreme Court. I conceive that no copy of this letter is called for by this interrogatory. I will add that I have named no fee and received no employment as yet in the case.

Everything that I have received from W. P. Ballinger as to this suit or as to any matter or thing connected therewith is contained in two letters, copies of which I attach hereto as Exhibits A and B, omitting from the letter of August 10, 1882, a portion at the close, as being wholly immaterial to this suit and to any matter or thing connected therewith and relating solely to personal and family matters.

Seventeenth cross-interrogatory. The answer of defendant in this suit has been printed. Have you a copy of the printed answer? If yea, then please refer to pages ten and eleven of said printed answer; state fully and specifically what you know as to allegations therein made and set out. And (*a*) have you any personal knowledge of when, where, and by whom the certificates therein mentioned were transferred? If yea, how do you know? (*b*) Have you personal knowledge as to whether said shares were sold, loaned, hypothecated, or pledged by A. S. Lipscomb or what the indorsements thereon represent? Do you know what Lipscomb put his name or the name of David White on said certificate for?
208 Do you know what was the consideration passing to Lipscomb for putting his name or that of White on said certificates, and do you know whether Lipscomb delivered any or all of said certificates; and, if yea, do you know to whom, when, and where, and for what consideration he delivered the same? Declare fully, stating how you know.

MANN & BAKER.
GRESHAM & JONES.
M. C. McLEMORE.

Answer to seventeenth cross-interrogatory. I have a copy of the printed answer in this suit and have referred to pages ten or eleven thereof. All that I ever have known about the matters and things alleged was derived from the company's books and files, including the certificates of White's stock and the endorsements thereon. I know nothing else now. I do not remember any details of the information I gathered from the company's office, books, numbers, dates, indorsements, etc., and I cannot state anything fully and specifically as of my own present knowledge in regard to the allegations on said pages.

(*a*) I have not.

(*b*) To each clause and particular of this interrogatory I answer no.

W. H. GODDARD.

Sworn to and subscribed before me on the days, at the place, and between the hours aforesaid.

A. A. BROOKE,
U. S. Commissioner.

THE UNITED STATES OF AMERICA, *District of Columbia,* } *ss:*

I, Albert A. Brooke, commissioner of the United States *supreme* court in and for the District of Columbia, duly appointed, commissioned, qualified, and acting as such, do hereby certify that the annexed copies of letters, marked Exhibits "A" and "B" respectively and referred to in the last paragraph of the answer to the sixteenth cross-interrogatory are in the handwriting of W. H. Goddard, and are true and correct copies of so much of the originals as relate to this case, said originals having been carefully read by me in full and compared with said copies; and I further certify that the portions of said original letters which are omitted from said copies are, in my opinion, immaterial to this suit, as they relate solely to personal and family matters and do not mention any matter or thing connected with or relating to said suit.

In testimony whereof I have hereunto affixed my signature and official seal this sixteenth day of October, 1882.

A. A. BROOKE,
Commissioner of the United States Circuit Court in and for the District of Columbia.

209 (EXHIBIT A.)

(Four pages.)

(Copy.)

GALVESTON, *August* 10, 1882.

W. H. Goddard, Esq.

DEAR SIR: We are now taking testimony in the case of White's Heirs *vs.* The City Company. They examined Darragh and have spent several days in examining Judge Cole, requiring production of each share of the White stock, all of which have been produced and undergone scrutiny and been copied into the record so far as material. Their fight seems to be on three shares which Lipscomb transferred, as attorney of White, to himself a few days before White's death and which, they allege, he had no authority to do, and, although the company renewed them to Lipscomb, this was a nullity, and the shares in their defaced and cancelled state remained the property of White and his heirs since his death.

Then sixteen of the certificates are indorsed as follows: "July 1, 1841. David White, by Abner S. Lipscomb, attorney-in-fact.

"Witness: Levi Jones, John P. Borden."

These certificates were renewed to James Love, March 2, 1842. White died, meantime, Dec. 10, 1841. I think that they will contend that the date, July 1, 1841, was written in subsequently to White's death, and the delivery to Love was, in fact, after White's death. Of this I do not think there can be a particle of evidence, except such presumption as would arise from the fact that on the second of March Lipscomb also transferred to Love some other renewed certificates, which is no presumption at all. John P. Borden writes to me that he has wholly forgotten the transaction, but is very certain he never witnessed any certificates with indorsements of false dates. He is the only survivor. We will take his deposition.

There were five other certificates in question, but one was transferred by White himself, and the others, I think, are well accounted for as previous to White's death. After arguments and decision on the demurrer and I had filed the answer, Judge Mann said to me that Mr. Molton thought I ought not to appear in the case on account of my connection with the case on behalf of White's heirs. Molton is the son-in-law of Rob't J. Ware, White's son-in-law and executor. The facts are that in 1869 he came to Galveston, claiming certain real estate as belonging to Ware, then deceased, who had bought out the other heirs of White. Some of this real estate had been purchased from the City Company by White stock and title taken to Lipscomb, who executed instrument recognizing part interest of White's estate, and had proceeded to dispose of the larger part of it. I was employed to clear up the Ware title and assist in sale of the property. At the same time he had statements from the City Company by Gail Borden and subsequently by Cole, showing that the White stock, sixty-seven shares, had been cancelled by the company, but that the cancellation of some of it had taken place subsequent to White's death. There was a suspicion that
210 this might have been transferred by Lipscomb after White's death, and, if so, the question was, had White's heirs any existing remedy? I told Molton that the suits of Scott *vs.* The City Company was pending, which involved the question of limitation on stock; that I was attorney for the City Company, relying strongly on limitation as against claim to stock, even if originally the company was bound for it; that if the court decided against the company in the Scott case I then might advise suit in this case, and would let him know my conclusions about it as soon as it could be done. I never undertook to bring suit. He knew my adverse employment by the company on the question involved. I never received retainer, a cent, in any way. I did not undertake to tell him if I thought there was reasonable probability for a case, the only chance for which would be such a decision in the Scott case as would obviate the bar, the facts of the cancellation of the stock and the knowledge of it being unquestionable. Some time in 1873 I notified him that I did not consider that there was any case. In the conduct of Cole's examination they are evidently intending to try to show that I was the attorney of the City Company, generally

retained, when consulted by Molton about the matter, and, to my astonishment, Judge Cole testified to-day that ever since 1861 I had been the general counsel of the City Company and its special adviser, the company, in some very important litigations it had had, only employing other counsel at my request. If I had had any conjecture of such a point of examination I would have reminded Judge Cole of the facts.

Ballinger & Jack were employed by the City Company to conduct the suit against the wharf company (this was before the war), and paid a specific fee in a quarter of an out-lot. When Scott sued the City Company Hale was employed and put in the answer. We were not employed until it had been pending some time, and doubtless on account of Hale's habits. This was in 1868. We had no other retainer from the company, and were under no other obligation as its attorneys in any manner. The company employed us in the Scott case, along with Hale, at a stipulated price.

Some time in 1872—the precise date I hav-n't before me, but our first receipt of anything under it was in July, 1872—we received a general retainer from the company (Nov., '71). The matter transpired between you and myself. I told you of my having been spoken to in the matter of White's heirs and was at liberty to bring a suit if satisfied from the result of the Scott case or otherwise that they had a cause of action. It is quite likely that I may have said to you frankly what my impressions were about the White claim, as you knew I had the strongest faith on behalf of the company in the Scott case, and the White case was a still stronger one as to limitation; but I have no distinct recollection as to this, and certainly it found no inducement to my employment by the company. If I had felt that my entire fidelity as a lawyer was not above suspicion I might have apprehended such suspicion by you as to connection with a future case, if the decision of the court should be ad-
211 verse to the company in a case in which I was employed by the company, but I knew you would not mistrust my entire zeal. I think Judge Cole, in his cross-examination and when I remind him of the facts, will make all proper explanation; but I may wish to take your deposition, and would like to know if your recollection confirms the above.

* * * * * * *

Yours truly, W. P. BALLINGER.

(EXHIBIT B.)

(Copy.)

GALVESTON, *Sept.* 23, 1882.

Wm. H. Goddard, Esq., No. 1326 19th street N. W., Washington city, D. C.

DEAR SIR: I hand you herewith direct and cross-interrogatories and agreements to take your deposition in the case of Asenath A. Ware and others *vs.* The Galveston City Company. Please find out some experienced United States commissioner or examiner in equity

familiar with taking and certifying depositions in equity practice and give your deposition before him as soon as convenient to you. The evidence, I suppose, will be closed in the case by the first Monday in November, so that your deposition must certainly reach here during October, the earlier consistent with your convenience in the matter the better to guard against accidents of all kinds.

I beg to remind you that at the date of the general employment of B., J. & M. as counsel of the company in the suits pending against it and in which we thereby became retainer without any previous connection therewith were the Edgar case, the Hardin case, the Phillips case—similar to the Scott case; the State of Texas case, filed June 8, 1871, and two cases, each for stock in the company, brought by Mrs. Lipscomb as executrix of A. S. Lipscomb, deceased, and L. W. Groce, Jr., as administrator of Mrs. C. G. Groce, brought June 18, 1871, and to request you to be as full as your memory will serve in detailing what transpired between us at the time of our employment. I hand you herewith $10, which I hope will cover the fee of the officer who takes your deposition. If not, balance shall be forwarded immediately on advice of the deficiency.

Yours truly, W. P. BALLINGER.

UNITED STATES OF AMERICA, *District of Columbia*, } *ss*:

I, Albert A. Brooke, a commissioner of the circuit court of the United States in and for said District, duly appointed, commissioned, qualified, and acting as such, do hereby certify that the witness whose deposition is above set forth was of sound mind and lawful age and was by me sworn and examined upon the interrogatories and cross-interrogatories hereto annexed and his examination by me reduced to writing and subscribed by him in my presence on
212 the days, between the hours, and at the place in that behalf aforesaid; and I do further certify that I am not of counsel nor attorney for either of the parties to the suit or controversy or in any way interested in the event of said suit.

In testimony whereof I have hereunto set my hand and seal this sixteenth day of October, A. D. 1882.

A. BROOKE,
Commissioner of the U. S. Circuit Court in and for the District of Columbia.

Deposition of W. B. P. Gaines.

ASENATH A. WARE *et als.*, Complainants,
vs.
THE GALVESTON CITY CO., Defendant.

Suit pending in the circuit court of the United States, eastern district of Texas, at Galveston, in equity.

The complainants in the said suit or Messrs. Mann & Baker, Gresham & Jones, and McLemore, attorneys of record:

Take notice that on or after the fifth day after service hereof de-

fendant will apply to the clerk of the above court for a commission to take the deposition of William B. P. Gaines, who resides in Austin, Texas, or in Erath county, Texas, to be used as evidence in the above entitled and numbered suit in behalf of the defendant therein in answer to the following interrogatories:

First interrogatory. What is your name? How long have you resided in the State of Texas, and from what State did you come to Texas? What has been your business? What positions of public or official trust have you held in Texas?

Answer to first interrogatory. My name is W. B. P. Gaines. I have been in Texas since the sixth of August, 1835, and came from Alabama to Texas, but was raised in South Carolina. I was a planter in southern Texas for many years, and have operated and dealt a good deal in Texas land. I was paymaster general in the Texas army in 1835–'6; have been member of the Texas legislature several sessions.

Second interrogatory. Were you not acquainted with Abner S. Lipscomb; if so, when did your acquaintance with him commence? What was its nature—slight, casual, intimate, or how should the fact be stated? Was there not any relationship between you; if so, what?

Answer to second interrogatory. I was acquainted with Abner S. Lipscomb; was raised in same county in South Carolina that he came from; knew him intimately from the time he came to Texas until the time of his death. I knew him in Galveston, Austin, and Washington county, Texas. His first wife was a Miss Gaines, and there was some slight connection, but I do not know the degree. Judge Lipscomb visited Texas before he moved to Texas permanently.

213 Third interrogatory. Were you not acquainted with David White, formerly of Mobile, Alabama; if so, when and where did said acquaintance commence? What was its nature—slight or intimate? Did you meet him in Texas; if so, when and where?

Answer to third interrogatory. I was acquainted with David White. I first met him in Mobile, Alabama, in 1834. I knew him very well, but there was no particular intimacy between us. I met him in Texas several times during the early settlement of Galveston.

Fourth interrogatory. If you know, please state what were the personal relation- as to intimacy, friendship, etc., or the reverse of these, or stating same as the fact was, between David White and Abner S. Lipscomb. When and where did they commence, and how long continue? State your means of knowledge or information.

Answer to fourth interrogatory. I think they were strong friends and very intimate. Their relations with each other commenced in Mobile, but I cannot say when. They were together a great deal and appeared to be intimate.

Fifth interrogatory. If you have knowledge of the facts, state what were the business relations between said White and Lipscomb; when and where they commenced, and state the character and terms thereof and to what the same related. Were they or not ever in

Texas together; if so, when, where, and what business? Give date as nearly as you can. Did they visit Texas together or separately? Which came first? How long did each remain? What was the business of said White? What was the business of said Lipscomb? Did the same have any relation to the Galveston City Company or to M. B. Menard, the founder of said company? If so, give full particulars thereof, stating fully and in detail all the connection of said White and Lipscomb therewith. State the claims and demands of said White. State how the same were settled or what was the result thereof. State by whom the settlement was made. State fully your means of knowledge and information.

Answer to fifth interrogatory. The only business relations between them that I have any knowledge of are what I learned from them in Galveston, Texas, about their Galveston interests. This was about 1837 or 1838, as well as I can remember. The business related to stock in the Galveston City Company. I think they were in Texas together about 1837 or 1838 on business connected with their Galveston interests. I don't know whether they came together or not. Mr. White did not remain very long. Mr. Lipscomb was in Galveston a good deal of the time. Mr. White was looking after his interest in the Galveston City Company, and there appeared to be some trouble about the matter. I met him one day as he was going to the boat on his return home and asked him how he had settled his matters with the Galveston City Company, and he replied that he had placed the matter in the hands of Judge Lipscomb, who was his attorney and agent, and that Lipscomb had full power to attend to the business. I understood from
214 Judge Lipscomb himself that he had a half interest as attorney and agent for Mr. White in the stock owned or that was to be issued to Mr. White by the Galveston City Company. I don't know anything about the final settlement.

Sixth interrogatory. On the — day of November, 1838, sixty-seven shares of stock in the Galveston City Company were issued in the name of David White. Where was said White at that date? Where was said Lipscomb at that date? To whom was said stock delivered? Why was it delivered or issued? What was the consideration thereof? Do you not know anything about the arrangements between M. B. Menard and David White as to the issuance and sale of stock representing the *Galveston* site of the city of Galveston? If so, state what powers respecting such stock were claimed and exercised by said White, and state what compensation or commission he claimed on the stock of said company, and, if you know, state what he received, how he received it, in what, and when and by whom it was obtained.

Answer to sixth interrogatory. I cannot remember dates exactly. It has been so long ago that a great many details have passed out of my memory. I cannot say positively whether White or Lipscomb were in Galveston in November, 1838. I think they were there about 1837 or 1838, but cannot give the month or day. I don't know to whom the stock was delivered. There was some arrangement be-

tween M. B. Menard and David White about stock in the Galveston City Company, but I do not remember it now.

Seventh interrogatory. If you have stated that Abner S. Lipscomb was attorney for David White, then please state when his character or acts as said attorney first began and to what business or duties it related and how long the same continued, and state all facts or services as such of which you have any knowledge, giving your means of information, and please state all that you may know as to the compensation of said Lipscomb, whether it was or was to be in money or how else, giving particularly your means of knowledge or information.

Answer to seventh interrogatory. In this Galveston City matter Judge Lipscomb's connection with Mr. White began, as I have said, about 1837 or 1838. I understand from Judge Lipscomb that he had a half interest in the interest of Mr. White.

Eighth interrogatory. If you know anything of stock in the Galveston City Company obtained by or for David White, state when, by whom, and on what consideration or causes it was obtained; and if you know anything as to any interest, share, or part in said stock ever held or claimed by Abner S. Lipscomb, state all that you know about it. If you state any conversation by either of them, give the place and date as nearly as you can, and give all the surroundings and circumstances which led to such conversation; and if there was more than one conversation give date and place of each, and state what led to it and all that was said on the subject. At the time of such conversation with Judge Lipscomb, if any, where was the stock to which it related and in whose hands or pos-
215 session at the time? Was not such conversation or conversations in any connection with the intended or proposed use of the stock, and what was such proposed use?

Answer to eighth interrogatory. I have stated all that I remember about the matter.

Ninth interrogatory. In a certificate of purchase issued by the Galveston City Company on the twenty-ninth of August, 1839, to Lipscomb and White for thirty-two lots in the city of Galveston, as follows:

Lots 8, 9, 10, and 11, in block No. 371;
Lots 1 to 14, inclusive, in block No. 370;
Lots 6 to 9, inclusive, in block No. 668;
Lots 8 to 14, inclusive, in block 369;
Lots 8 and 9, in block 626;
Lot 2, in block 680;

what connection, if any, did you ever have with said lots or any of them? State the facts fully, and state how the said lots were issued or claimed to be issued at the time you became connected with them. How were said lots acquired from the City Company? If you state that stock was exchanged or sunk for them, how was said stock used? What were the respective interests of the parties therein, and what was the act and claim of the parties and each of them as to said interest in said stock and said lots? State all facts and all contemporary conversation with either White or Lipscomb

with regard to said stock or said lots in any manner tending to explain ownership or claim of ownership to the same.

Answer to ninth interrogatory. My recollection is that Judge Richard Morris and myself bought some lots in Galveston—about that number—from Judge Lipscomb and gave our joint notes to Lipscomb for them. We afterwards sold them to Dr. Levi Jones. Jones failed to pay for them, and Judge Lipscomb cancelled the trade with us and took the lots back. I suppose Judge Lipscomb got the lots by surrendering his stock. Judge Lipscomb control-ed the matter and made the trade.

Tenth interrogatory. Do you or not know anything of any exchange or agreement for exchange of stock in the town or city company of San Leon made in the spring of the year 1840 between Abner S. Lipscomb and John Buchanan? Who was John Buchanan? Where did he live? What connection had he with business and affairs in Texas? What stock in the Galveston City Company did said Lipscomb transfer to said Buchanan? What right, share, or interest therein, if any, did he claim? Why did he make such exchange? What were his motives or reasons? State all facts known to you on that subject. Please give the full history of the town, scheme, or project of San Leon. When was it entered into—at what place? By whom? Who are the parties mainly concerned in the same? Who issued the stock and where did they reside? What was the nature of the acquaintance or association of said parties, if any, with David White? Where did White re-
216 side? Had White any, and what, knowledge or opportunities of knowledge or information in regard to San Leon?

Answer to tenth interrogatory. I have a slight recollection of some transaction between Judge Lipscomb and John Buchanan, but do not remember details. Judge Lipscomb did not have much confidence in the future of Galveston after the overflow of 1837. I was in New Orleans after the overflow of Galveston in 1837, and met there Judge Lipscomb, Otis Dyer, and some other gentlemen, and they said they had concluded that Galveston was too low for the creation of a city. Monroe Edwards was there with some other parties from Texas, and heard of the proposition to state a new place on the main land. He proposed to let them have half of his father's head-right on Edwards' Point for the site of the new town. The gentlemen named proposed to me that if I would take charge of the place they would buy it and give me an interest, which I agreed to do, and we went to Mobile and organized the company. The principal parties were Judge Lipscomb, Mr. Poe, of Mobile; Mr. Otis Dyer, of Tuscaloosa, and Monroe Edwards and one or two others. I don't know whether Mr. White had knowledge of this or not. Judge Lipscomb may have notified him.

Eleventh interrogatory. Do you not know anything of any other exchanges of Galveston City Company stock made by said Lipscomb for property or interests at any other? If so, state all particulars thereof, when made, why made, what was the ownership of the stock so exchanged, and for what account or interest was the same made; give facts and particulars fully.

Answer to eleventh interrogatory. I have stated all that I know.

Twelfth interrogatory. Do you not know anything of the opinion of David White and Abner S. Lipscomb and of each of them as to the prospective advantages, desirableness, value, etc., of Galveston as a site for a future city in the years 1838, 1839, 1840, 1841, or about those years? State all that you know on the subject and give your means of knowledge and information.

Answer to twelfth interrogatory. I do not know what Mr. White thought, but Judge Lipscomb did not think much of the future of Galveston.

Thirteenth interrogatory. Do you not know anything of the causes or reasons which induced Judge Abner S. Lipscomb to determine to remove from Alabama to Texas, and what interest, claims, or rights he had or claimed to have in Texas at that time? State fully and in detail and give your means and grounds of knowledge and information.

Answer to thirteenth interrogatory. All I know is what he told me—he thought he could do better in Texas than in Alabama.

Fourteenth interrogatory. What was the general reputation as to ability, character, integrity, and honor or the reverse of these of Abner S. Lipscomb at the time of his removal to Texas and throughout his life? State fully.

217 Answer to fourteenth interrogatory. The general reputation of Judge Lipscomb for ability, integrity, and honor was good during all the time I knew him.

Fifteenth interrogatory. What were the pecuniary circumstances of Judge Lipscomb at the time of his death?

Answer to fifteenth interrogatory. I think he was in comfortable circumstances, but not wealthy.

Sixteenth interrogatory. Do you not know the particular character and reputation of David White?

Answer to sixteenth interrogatory. So far as I know, it was good.

Seventeenth interrogatory. Do you know or can you set forth any other or further facts, matter, or thing which could be of benefit or advantage to either of the parties in this suit or material to the subject of this your examination? State the same as fully as if specially thereto interrogated.

Answer to seventeenth interrogatory. I have stated all that I know.

W. B. P. GAINES.

In the Circuit Court of the United States, Eastern District of Texas, at Galveston.

ASENATH A. WARE *et als.*, Complainants,
vs.
THE GALVESTON CITY COMPANY, Defendant. } In Equity. No. 155.

Cross-Interrogatories by Defendant to W. B. P. Gaines.

First cross-interrogatory. In what year and what month of the year did you first come to Texas? When did you come to Texas

to live, and where did you live in Texas from your arrival to 1842? How old are you?

Answer to first cross-interrogatory. I reached Nacogdoches, Texas, on the sixth day of August, 1835. I came to Texas to live in 1835, as stated. I lived in Nacogdoches, Houston, and Galveston. I was born on seventeenth of September, 1808, and will soon be seventy-four years of age.

Second cross-interrogatory. If, in answer to fifth interrogatory, you have stated the business relations existing between David White and Abner S. Lipscomb, then state fully when, where, from whom, and how you became advised of their business relations, and (*a*) is it not the fact that Lipscomb had been White's lawyer in Alabama, and, when Lipscomb came to Texas, White gave him a power of attorney to sell certain stock belonging to White, which Lipscomb had recorded in Galveston county, and the City Company has put the same in evidence in this suit? And (*b*) if you have stated
218 in answer to fifth direct interrogatory that White and Lipscomb were ever in Texas together or at same time, then state how you know it. Did you see them together? When was it? Where was it you saw them and how long after you came to Texas was it? And (*c*) do you not know that David White never was in Texas but twice? And (*d*) do you not know that David White never was in Texas after 1838? And (*e*) how is it that after this lapse of time you know anything as to David White or his movements? And (*f*) if you are so fully advised as to David White, when and where did he die, and how do you know the same? (*g*) If you have answered to said fifth interrogatory, as to what David White had to do with the Galveston City Company, then please state how you are so advised. When, where, and from whom did you obtain the information? And (*h*) do you not recollect that some ten years ago you told G. E. Mann, then of counsel in suit of Scott *vs.* Galveston City Company, that you had no particular knowledge of David White's connection with the Galveston City Company or his interests therein? And (*i*) is it not the fact that Abner S. Lipscomb was not only poor when he came to Texas, but left heavy debts behind him in Alabama? And (*k*) did he not practice law from his arrival in Texas to his becoming a judge? And (*l*) did he not live in Austin county, Texas, three or four days' travel from Galveston in those days?

Answer to second cross-interrogatory. From statements made to me by Judge Lipscomb and Mr. White; see answer to fifth direct interrogatory. I do not know anything about their business relations in Alabama; do not know anything about a power of attorney. I said I thought they were in Texas together some time about 1837 or 1838.

It was two or three years or more. (*c*) I do not. (*d*) I do not. (*e*) I know it from his statements to me. (*f*) I do not know. (*g*) This has been answered in direct interrogatories. (*h*) I may have said something to Judge Mann; I cannot remember now. I have no particular remembrance now, except what I have already stated about White and Lipscomb. (*i*) He was not wealthy when he came

to Texas; he may have owed something in Alabama; can't say how much. (*k*) He was a lawyer and practiced until he became judge. (*l*) I think he stopped for awhile in Austin county.

Third cross-interrogatory. Have you not made a statement under oath in this case at request of Judge Ballinger in November, 1882, and did you not say that Lipscomb had once told you that he had an half interest as attorney-in-fact for David White in stock owned by or which was to be issued to David White? If you say you so deposed, then please say how many, and what, shares Lipscomb referred to and had they been issued to White or were they to be thereafter issued to David White. And (*a*) where were you when Lipscomb told you this? (*b*) What was it Lipscomb said to you? (*c*) What lead to his making the statement to you? (*d*) Who
219 were present when he made said statement to you? (*e*) In what year, what month, did said conversation occur, and about what time or date of the month? And (*f*) do you not know that David White personally settled with the Galveston City Company as to the matters for which he got the stock, and that the only matter against the company he had in Lipscomb's hands was a claim for money advanced to the company?

Answer to third cross-interrogatory. I stated that this was my understanding from Judge Lipscomb. I don't know how many shares. (*a*) I think it was in Galveston, but am not certain. (*b*) I cannot repeat his exact words now, it has been too long to remember them exactly. I understood from him that he had half interest in White's interest, as his agent and attorney. (*d*) No one that I remember. (*e*) I cannot give exact dates; it was somewhere about 1837 or '38. (*f*) I do not.

Fourth cross-interrogatory. If you have stated that you know of David White's connection with the Galveston City Company, then do you not know that David White advanced 50,000 dollars that was paid for the league and labor of land, the capital of the company? And (*a*) that he was to get for such loan interest and one-tenth of the stock; that the company compromised with him and gave him the stock and paid him $25,000 of the loan; and as to the recovery of the balance of the $50,000, he had his claim in Lipscomb's hands on a contingent fee of half? And (*b*) do you not know that White had gotten all the stock he ever got from the Galveston City Company before Lipscomb ever was in Texas? (*c*) And do you not know that the power of attorney from White to Lipscomb is dated April 8, 1839, and was the only power Lipscomb had from White?

Answer to fourth cross-interrogatory. I think White had some contract with the Galveston City Company about paying money; do not know what it was. I never inquired into it particularly. (*b*) I do not. (*c*) I never saw any power of attorney and do not know anything about the dates nor how many there were.

Fifth cross-interrogatory. Did you ever buy any Galveston City Company stock from Lipscomb, acting as attorney-in-fact for White? If yea, how many shares and what did you pay and when did you buy?

Answer to fifth cross-interrogatory. I think I got one share from Judge Lipscomb, but don't remember particulars now.

Sixth cross-interrogatory. Did Abner S. Lipscomb ever tell you that he loaned sixteen shares of said stock of D. White in said company to James Love, and that Love had become bankrupt and could not return it?

Answer to sixth cross-interrogatory. I do not remember his telling me this.

Seventh cross-interrogatory. When was the last time that Lipscomb spoke to you as to David White's shares in City Company? What year was it and what did he say? And (*a*) did you ever write to Lipscomb as to any of said shares? If so, what did you say?

220 Answer to seventh cross-interrogatory. I have answered this. (*a*) I do not remember writing to him.

Eighth cross-interrogatory. In sixth interrogatory counsel for defendants have stated that in Nov., 1838, sixty-seven shares of said stock were issued to David White. Now, do you know that such was or is the fact except by reason of his statement? And (*a*) if you have any independent knowledge, please state fully what it was and how you became advised of it. And (*b*) in said direct interrogatory you are asked who received said certificates from the company; if you say who received them, state how you know it.

Answer to eighth cross-interrogatory. I suppose stock was issued to David White, but I do not know the number of shares nor when issued. (*b*) I don't know.

Ninth cross-interrogatory. You are asked, in direct interrogatory eighth, if the conversation with Lipscomb, in which he said he had an interest in the White shares, was not in connection with proposed use of said stock. Now, (*a*) did not Lipscomb say that if he reinvested for White and changed the stock for land by sinking in the company he, Lipscomb, was to have a one-half interest in the reinvestment and for reinvesting and looking after the property so obtained?

Answer to ninth cross-interrogatory. (*a*) I do not remember it that way. Judge Lipscomb told me that he had a half interest with White.

Tenth cross-interrogatory. In ninth direct interrogatory you are asked as to certain lots you once owned in Galveston, about 1839. Now, (*a*) do you know that the lots mentioned were ever owned by you except that it is so stated? And (*b*) do you know any further than that you once owned for a short time a number of lots obtained by Lipscomb from Galveston City Company by sinking shares belonging to David White? And (*c*) was it not in connection with this very lot matter that Lipscomb explained to you he had a half interest in them by reason of having reinvested White's stock in them?

Answer to tenth cross-interrogatory. This is answered in direct interrogatory number nine. Judge Richard Morris and myself bought the lots from Judge Lipscomb. (*c*) Not that I remember. I do not remember his saying anything about reinvesting.

Eleventh cross-interrogatory. Was not the San Leon Company,

for a town site on Edwards' point, in Galveston county, formed in Mobile before you came to Texas by the agreement as to same as between you, Monroe Edwards, and others? And (*a*) did not A. S. Lipscomb draw the articles of agreement as to said company or for its organization? And (*b*) are they not of record in Galveston county, Texas? And (*c*) did not said Lipscomb have one-twelfth of all the shares of stock for his services rendered and to be rendered to said San Leon Company? And (*d*) was not his interest in said company one of the main inducements for him to come to Texas? And (*e*) were you not the president and manager of
221 said company? And (*f*) how long was it before the San Leon bubble bursted? And (*g*) what was the value of the San Leon stock in Galveston in 1838, what was it in 1839, what in 1840, and in 1841, and in 1842? And (*h*) did not Lipscomb get more of said stock from the company than he could sell, and did he not have a number of certificates of San Leon stock left on his hands after they became unsaleable? And (*i*) did not Lipscomb and John Buchanan have various transactions as to San Leon stock? And (*l*) have you not stated by letter, in the past six months, that you have little or no recollection of the facts or even general history of the San Leon Company? And (*m*) have you not been a busy business man, with large landed and other interests in Texas, for past forty years, and, with other things to think of, have you not largely dismissed from your mind and forgotten what transpired forty years ago?

Answer to eleventh cross-interrogatory. No. (*a*) Think he did. (*b*) I believe they are. (*c*) He did not. (*d*) I do not know that this brought him to Texas. I was the manager of said company. (*f*) About one year. (*g*) I don't know that any of it was on the market. (*h*) I don't know. I expect he had some left. (*i*) I think they had one. (*m*) I have led a very busy life, and have forgotten a good many of the details of the past.

Twelfth cross-interrogatory. If, in answer to direct interrogatories, you state that Lipscomb had property or means at the time of his death, then (*a*) was it his separate property or his wife's? And (*b*) did he not go on the bench soon after he came to Texas and remain there on a meagre salary till he died, and were not both his wives women of independent property?

MANN & BAKER,
Counsel for Defendant.

Answer to twelfth cross-interrogato*ries.* He had some property—a plantation in Washington county, Texas, and some other property. His last wife had some property, but I don't know what his first wife had.

W. B. P. GAINES.

STATE OF TEXAS, }
Travis County. }

I, W. Von Rosenberg, a notary public for said county, duly commissioned and qualified, do hereby certify that the foregoing answers of the within-named witness, W. B. P. Gaines, were made

before me by said witness, reduced to writing by him, and were sworn to and subscribed before me by the said witness.

To certify which I have hereto set my hand and official seal, in the city of Austin, on the twelfth day of March, 1883.

W. VON ROSENBERG,
Notary Public, Travis County.

222 *Deposition of J. A. Lipscomb.*

ASENATH A. WARE *et als.*, Complainants,
vs.
THE GALVESTON CITY CO., Defendant. } No. 155.

Suit pending in the circuit court of the United States, eastern district of Texas, at Galveston, in equity.

Answers and depositions of J. A. Lipscomb, a witness in the above-entitled cause for the defendant, taken before Chas. Montague, Jr., the clerk of the county court of Bandera county, in answer to the accompanying interrogatories, propounded to him in said cause.

First interrogatory. What is your name, your age, your business or profession, your place of residence?

Answer to first interrogatory. My name is J. A. Lipscomb; I am thirty-two years old; I am a lawyer by profession; I reside at Gallagher Ranch, Medina county, Texas.

Second interrogatory. Are you or not related to the late Judge Abner S. Lipscomb? If so, state the relationship. When did he die?

Answer to second interrogatory. I am the son of Judge Abner S. Lipscomb, deceased. He died in December, 1857.

Third interrogatory. What was the pecuniary condition of the estate of Abner S. Lipscomb at the time of his death? State fully and particularly. If solvent, state the value thereof or realized therefrom over and above debts and liabilities; if not solvent, state the extent of such insolvency.

Answer to third interrogatory. The estate of my father was solvent at the time of his death. I do not know the amount of liabilities, but after paying all liabilities there was about thirty thousand dollars in land and money, which was distributed among the heirs.

Fourth interrogatory. Did or did not Abner S. Lipscomb at the time of his death leave papers relating to his accounts or transactions with David White or with the estate of said White, viz., Rob't J. Ware? If so, please state what became of such papers. State fully and particularly, giving all knowledge and information you possess in regard to the same and in regard to what disposition has been made of the papers of said Lipscomb estate, in whose hands they have been since his death, and what has become of them, and annexing any and all which may be in anywise material in this case. Has any person or persons representing the heirs or estate of David White ever had access thereto or to any and what

papers? If so, state the name of all such persons or of such person; state when; state all facts and circumstances connected therewith. Was or not anything said in regard to interest of said Lipscomb or his estate in stock of Galveston City Company?
223 If so, state all that was said on that subject, and state all or further facts in your knowledge in anywise material to either of the parties in this suit or the subject of your examination.

BALLINGER & MOTT,
Counsel for Defendants.

Answer to fourth interrogatory. I do not know. My mother was executrix of the estate. Judge Mann got all the papers relating to the David White matter that ever came into my possession. He claimed to be the representative of the White heirs, and said he believed that the Lipscomb estate had rights in the Galveston City Company which would be brought to light by a suit which was pending in the U. S. circuit court, and that he would look after those rights.

Cross-Interrogatories to Joseph A. Lipscomb.

First cross-interrogatory. Did not your father, Judge Abner S. Lipscomb, leave at his death, among other papers, a receipt from James Love, dated March 4, 1843, whereby said Love (then president of the Galveston City Company) acknowledged that he had received from said Abner S. Lipscomb thirty shares of Galveston City Company stock, to be returned when called for? And (*a*) was not said receipt the basis of a suit in the district court of Galveston county by Mrs. Lipscomb, executrix of estate of Abner S. Lipscomb, deceased, against the Galveston City Company? And (*b*) did not the Galveston City Company defend in that suit on the ground that the stock sued for never belonged to Judge Lipscomb, but was held by him for David White? And (*c*) did not said Galveston City Company then and have they not at all times since persistently and repeatedly refused to allow the representatives, attorneys, and agents of your father's estate access to the certificates of stock and indorsements thereon of the shares of its capital stock held by or standing in the name of your father? And (*d*) was not your father for many years previous to his death so engrossed by official duties as one of the justices of the supreme court of Texas as to be neglectful of other matters? And (*e*) do you not believe that by the neglect of Judge Lipscomb to have full memoranda of affairs and refusal of the Galveston City Company to assist investigation as to his stock matters or to allow investigation has deprived your father's estate of evidence of rights as against the City Company? And (*f*) did not your father's papers strongly indicate that he had placed two of the shares of said City Company standing in his name as collaterals to a debt due one Osterman, and has not the Galveston City Company failed and refused to allow you and others, on behalf of the estate of Abner S. Lipscomb, to examine the books and records of the company as to said shares? And (*g*) have you not now every

reason to believe that James Love or the Galveston City Company made way with said thirty shares of stock referred to in Love's said receipt to your father; and do you not believe that your father never got one cent from or for said shares and their proceeds;

224 and did not the Galveston City Company, through W. P. Ballinger or Ballinger & Jack, as attorneys, allege in the answers of the City Company to said suit by Mrs. Lipscomb that Abner S. Lipscomb had no right, title, or interest in them, and that they all belonged to David White or his heirs? And (*h*) the files of court papers (in said suit against the City Company by Mrs. Lipscomb) have disappeared from clerk's office; and if you have a copy of the answer in said suit, please annex it to your answer to this interrogatory.

Answer to first cross-interrogatory. I do not know. I know nothing of the proceeding in the case referred to. I do not think my father was so busy with his official duties as to make him neglectful of other business. I think the Galveston Company refused Messrs. Harris & Masterson access to the books of the company, and, of course, that makes me believe that there was something that they wished to suppress.

Second cross-interrogatory. The Galveston City Company, as one ground of defense in this suit, allege that estate of Abner S. Lipscomb was solvent, and that plaintiffs were bound to look to it before they could sue the Galveston City Company. Now, is it not a fact that though Judge Lipscomb left his family in easy circumstances, the property was acquired by marriage? And (*a*) do you not know that Judge Lipscomb was broken in fortune and had outstanding debts against him when he came to Texas, and that after coming to Texas he was most of the time justice of the supreme court, that paid more by honors of the position than by moneyed salary, and that he devoted himself exclusively to his official duties to detriment of his fortune and private business?

Answer to second cross-interrogatory. My father's estate was perfectly solvent and paid every debt against it, and had thirty thousand dollars in land and money for distribution among the heirs.

Third cross-interrogatory. Do you not know that among the papers left by your father was one as follows:

"WALNUT BLUFF, *Jan'y* 9, 1844.

"DEAR SIR: Please deliver to Dr. Rob't J. Ware, executor of David White, sixteen shares of Galveston stock, and oblige your friend,

"(Signed) ABNER S. LIPSCOMB.

"To Col. James Love."

Also another paper drawn as a receipt and left not signed, as follows:

"WALNUT BLUFF, TEXAS, *Jan'y* 9, 1844.

"Rec'd of Abner S. Lipscomb four shares of Galveston City stock and an order on James Love, Esq., of Galveston, for sixteen shares

more, which order, if paid, will make twenty shares of stock belonging to the estate of David White, deceased."

Also a paper as follows:

"I have this day received from A. S. Lipscomb thirty shares of Galveston City stock, which I promise to return to him when thereunto requested; value received.

"(Signed) JAMES LOVE.

"March 4, 1842."

225 Now, (*a*) where are the originals of said three papers set out above? And (*b*) were they not put into hands of attorneys for plaintiffs in said suit of Mary Lipscomb, executrix of A. S. Lipscomb, *vs.* Galveston City Company? And (*c*) are they not lost with court papers in said suit, or destroyed? And, (*d*) if not, what has become of them and who has them? If in your possession or control, attach to your answer, duly designated. And who has the originals of said three papers? And (*e*) do you not know that said order on Love for sixteen shares was in handwriting of Abner S. Lipscomb and signed by him, and said receipt (unsigned) was also in his handwriting? And (*f*) do you not know personally or as a matter of family history that your father, in January, 1844, went to meet R. J. Ware, Esq., of the estate of David White, at some point on Trinity river? And do you not know James Love held said stock for your father for safe keeping, and not indorsed to Love, and that the Galveston City Company permitted Love, then president of said company, to use said stock as his own, and that the concealment by the company of all facts has been because they knew they were responsible by reason of allowing such conversion when shares had not been duly transferred, and Love was *prima facie* not the owner of them.

MANN & BAKER.
GRESHAM & JONES.
M. C. McLEMORE.

Answer to third cross-interrogatory. I do not know. I never saw the papers referred to, and I know nothing about them. My father once lived at Walnut Bluff, on the Brazos, which is about three miles below Hempstead.

J. A. LIPSCOMB.

226 THURSDAY, *July 12th*, 1883.

On this day appeared W. P. Ballinger, counsel for the defendant, and George E. Mann, of counsel for the complainants, and thereupon the said counsel presented to and filed with the examiner the following agreement signed by them, to wit:

In the Circuit Court of the United States, Eastern District of Texas, at Galveston. In Equity.

ASENATH A. WARE *et als.*, Complainants,
vs.
THE GALVESTON CITY CO., Defendant.

"It is agreed that the deposition of W. P. Ballinger, written out by himself, without interrogatories, may be now filed with the examiner and sworn to and copied by the examiner, to be taken as his direct examination on the part of the defendants, subject to all other legal objections to the evidence and subject also to cross-examination by complainants on the return of said Ballinger from an absence from the city now designed; the said deposition not to be evidence unless complainants have opportunity for such cross-examination, and that the evidence in the above cause in all other respects be considered as closed.

Answers to cross-interrogatories to be made within ten days after my return to Galveston.

(Signed) MANN & BAKER,
For Complainants.
" BALLINGER & MOTT,
Counsel for Galveston City Co., Defendant."

Which said agreement is herewith returned; and thereupon the said W. P. Ballinger presented to and filed with the examiner his said deposition, written out by himself and sworn to before Walter L. Hanscom, deputy clerk of the circuit court of the United States for the eastern district of Texas, at Galveston, and the said deposition is here copied by the examiner; the original whereof is also herewith returned, to wit:

Deposition of W. P. Ballinger.

I consider it due to the truth of this case and to my own position in regard to it to state my former connection with the claim which is the subject-matter of this suit, and with the Galveston City Company, for which I am counsel.

In April, 1869, Mr. Thomas J. Moulton came to Galveston, and the acquaintance and business affairs which resulted were of his seeking.

Mr. Trueheart, then and now a land agent in this city, had had some correspondence with and employment from Robert J. Ware, and Mr. Trueheart had employed Ballinger, Jack & Mott, the
227 firm of lawyers of which I was a partner, to bring a suit against one —— —— to recover several lots in *in* this city, numbers —, in block —.

Prior to the war A. F. James was a land agent, with a large business as such in this city. He died in March, 1861, I think. I was one of his executors. As such the papers he had received from Robert J. Ware and such papers as he had himself obtained from other sources or made out came into my possession. Trueheart was in the same

line of business as James, and after some effort to be of service to Mr. Compton (son-in-law of James), who undertook a land agency, etc., but did not give it reliable attention, as far as conveniently came in my way I facilitated Mr. Trueheart in succeeding to business with which Mr. James had had connection.

After Trueheart was written to by Ware, Trueheart came to me and I turned over to him James' files of papers relating to Ware's business, the estate of David White, not as giving him right to them, but for accommodation and any service they might be to him.

Mr. Molton came to Galveston, I think, in company with his brother-in-law, Mr. Ware, who was executor of Robert J. Ware, then deceased. Both were in our office, but our intercourse was almost exclusively with Moulton, who, I think, remained longest in Galveston.

The immediate and urgent business, as explained to me, was to endeavor to get possession and control of and to render available by sale certain lots, which were a part of the 32 lots, in this city, for which a certificate of sale issued to A. S. Lipscomb and David White by the Galveston City Company ——, 183–, 16 shares of stock having been sunk therefor. This transaction is explained in the letter of Gail Borden, Jr., to Dr. C. Billingslea of June 22d, 1843, which is proved by the complainants in this case, and is Exhibit A, annexed to the deposition of the witness, J. P. Cole. It is also separately explained in Cole's deposition.

Certificate of purchase issued to Lipscomb and White was transferred to Levi Jones, to whom the company made conveyance of the lot. He afterwards conveyed them, but they were conveyed back to him, and he subsequently reconveyed them to A. S. Lipscomb.

Lipscomb sold some of the lots and subsequently conveyed the remainder of the lots to Memucan Hunt, in trust, to pay certain indebtedness to one Nicholas Lewis and for the heirs of David White.

Lipscomb subsequently to this conveyed his interest in certain of the lots, and the purchaser had brought a suit in the Galveston district court against the unknown heirs of David White and obtained a decree of partition.

The lots had been neglected by claimants under White, sales for taxes had been made, and claim was also made to the remaining lots on behalf of the estate of Judge Lipscomb.

The claim by Molton and his brother-in-law, Ware, was that these lots belonged to the estate of Robert J. Ware, who had bought
228 and owned all the interest in them of the devisees of David White and his widow, except Mrs. Asenath A. Ware, and their principal object was to make these lots available for the benefit of the estate of Robert J. Ware, in Alabama, which they represented as being of large value, but in urgent need of realizing funds, and also to dispose of the Ware interest in all lands owned by David White in Texas.

Mr. Trueheart was the land agent for this business and Ballinger, Jack & Mott were employed as lawyers to aid in and accomplish the

business. These lots were all claimed by Molton and Ware as belonging exclusively to the estate of Robert J. Ware and to his widow, and also all other property owned by David White in Texas, except a certain interest in lands not on Galveston island bequeathed to Dan'l and Clement White.

The right and interest of the other devisees or heirs of David White and Mrs. White was entirely denied by them.

Whilst Molton was in Galveston, as well as I now recollect, terms of sale of one or more lots to Ranger for $6,000 gold were negotiated upon satisfactory title being made. After Molton's return to Alabama he forwarded to B., J. & M. the titles satisfactory to Ranger, including conveyances from Thomas J. Cowles, from Mrs. Holtzclaw and her husband, and from David P. Lumpkin, as I shall hereafter more fully and specially explain. These conveyances were not of the specific Galveston lots, but were of all their interest in the estate or property of David and Mary S. White in Texas. I speak, however, generally. They were put on record in the county clerk's office of Galveston county and will speak for themselves.

B., J. & M. remitted to Ware's executors the purchase-money from Ranger.

Under our advice Trueheart subsequently took out letters of administration on the estate of Robert J. Ware, and as such and as agent for Mrs. Ware he disposed of all the other lots and remitted the proceeds to the executor in Alabama. Sales of all these lots amounted, as I see Mr. Molton states in his deposition, to $14,000.

At the same time that B., J. & M. were retained to aid in the recovery and disposition of these lots Mr. Molton consulted us as to the liability of the Galveston City Company for shares of stock which had been issued to David White.

Mr. Molton had obtained, according to my present recollection, the papers from Trueheart which I had turned over or handed to Trueheart and which had been in my possession as executor of James, and these, with other papers, were placed in our possession by him. Among them were the statements by Borden annexed as Exhibit A to the deposition of Cole and the statement by Cole as exhibit to said deposition, the former, dated in 1843, showing that all the David White stock, 67 shares, had at that date been cancelled by the City Company, except — shares, and the latter dated
229 in 1854, and showing the cancellation of all the stock and the date thereof. There were also copies of certain papers obtained by A. F. James, as I understood, from the papers of Judge Lipscomb, deceased, and which are annexed to the deposition of Mr. Molton in this case; particularly copy of a receipt to Judge Lipscomb from James Love, dated March —, 1842, for -- shares of stock.

Copy of a statement by David White that Lipscomb was jointly interested with him in fifty-six shares of stock, dated —, and copy of another statement by Lipscomb claiming joint interest or partnership in an amount of stock covering the entire White stock and showing disposition made of a certain part of the stock.

If there was any other paper or document having any material bearing on the case I do not now call it to mind.

The claim against the City Company, so far as I ever understood it, was based on the suspicion that a certain number of shares of stock had been transferred by Lipscomb to Love subsequent to the death of David White; and, if so, whether suit could then be maintained for the recovery of the stock.

Under my advice application was made to the City Company for permission to examine its books with reference to the David White stock. The precise terms of the application I do not call to mind. This was refused, as I understood, by the company.

I stated to Mr. Molton as my decided and strong opinion of the law that the cause of action was barred for the stock, even if transferred by Lipscomb in 1842, after White's death. That Ware, the representative of White's estate, was put upon inquiry as to this soon after he became executor with every means of ascertaining the facts. The claim for the stock was in right of Ware himself. The only doubt had was as to the interest of Mrs. Ware, but I thought she, too, was barred, especially as Molton stated that White's estate proved insolvent by more than $50,000. I stated that I was just fresh from the most thorough examination which I was capable of making of the question of limitation and laches applicable to the recovery of stock in joint stock companies; that a suit of Scott's against the Galveston City Company had been brought in the Galveston district court by a party to whom or his assignor David White had issued a share of stock in what was claimed to be the Galveston City Company as organized by him in Mobile under power from M. B. Menard, and it was claimed that in the subsequent organization of the company under Menard a provision had been made that the shares of stock issued by White should be shares of the company.

The share sued on had been held by the party to whom it was issued or transferred, but never further recognized by the company, and the case had required investigation of the principles on which the rights of a shareholder in stock of the company could be barred by limitation and laches.

230 That in that suit I was one of the attorneys of the Galveston City Company, and although the case had been decided in favor of the continued rights of the stockholder in the district court, an appeal had been taken to the supreme court and the case had been argued before the court by myself on behalf of the City Company, and my opinion was that the case would be reversed and that remedy was barred. I said that the decision of the court in that case might be of a character to change my opinion on the right of action for stock belonging to White, if transferred to the company after White's death; that I would do all in my power to elicit the facts as to whether transfer had been made of any of the stock subsequent to White's death, and if so, and if I came to the conclusion from the decision of the supreme court or further investigation that suit could be maintained for the stock, I would inform them, and would be glad to bring the suit, as stock had then appreciated

to a very high value, to near $10,000, from $150 per share, and the case would be a very important one.

Mr. Molton says in his deposition that he represented on his trip to Galveston and applied to B., J. &. M. as the representative and agent of the heirs of David White and in his character as administrator of the estate of David White and also of the estate of Robert J. Ware, exhibiting to us the conveyances which had been made by the heirs of White to Robert J. Ware, and leaving it to us to decide the rights of the several parties. I understand the meaning which he seeks to convey to be that we were equally the attorneys of Holtzclaw and wife, and Cowles and Lumpkin, and Daniel and Clement White as the attorneys of Mrs. Ware and of the Ware estate in his transactions with us.

A grosser perversion of truth could scarcely be manufactured. The character in which he applied to us and in which our entire relations with him were carried on from first to last, including therein R. J. Ware, the executor of his father's will, who came with him, was solely and exclusively in right of and representing the estate of Robert J. Ware and also Mrs. Ware, the widow. He stated to us that Robert J. Ware had bought all interest and right whatever of Mrs. Holtzclaw, Lumpkin, and Cowles in the estate of David White and Mary S. White in Texas, and was the legal and equitable owner of them; that he believed Ware had also bought the interest and right of Dan. and Clement White, but he had not been able to verify this as yet satisfactory. He also stated as an admitted, undenied fact that the estate of David White was insolvent and owed R. J. Ware's executor over $50,000.

Instead of submitting to me or to B., J. & M. when he came to Galveston in 1869 conveyances from the Holtzclaws, Cowles, and Lumpkin for us to decide their effect, he had no such conveyances;

231 but his statements and assumptions were as positive as they could be that such conveyances existed. He represented the estate of R. J. Ware as entirely solvent—in fact, wealthy; but that times were very hard and out of joint in Alabama, and that mortgage or mortgages existed on its most valuable property, necessitating the raising of money for relief, which he was most anxious to effect by realizing on the interest of the Ware estate and Mrs. Ware, in whatever could be made available in Texas. His claim was entirely adverse to—that is, exclusive of—any interest or right whatever in the Holtzclaws, Cowles, and Lumpkin, in anything whatever in Texas in right of David White or his widow, and also a denial of any right in David or Clement White except to an interest in lands outside of Galveston, which he believed had also been conveyed, if he could correctly elicit the facts. Molton and Ware employed Trueheart, as land agents, to find a purchaser to certain of the Galveston lots, which were not claimed by Lipscomb's heirs, and Mr. Ranger was willing to buy them at a price—$6,000 in gold. Molton left Galveston to make satisfactory conveyance of these lots to Ranger. B., J. & M. were the attorneys of Ranger, as he knew, and the title had to be satisfactory to us. He was to send the titles from Alabama. The $6,000 gold was to be sent to the

executor of Ware at Montgomery; all which shows, at the beginning, that the transaction was in no degree in right of or for the benefit of the other heirs of White.

I cut from my letter book (bound in 1870, of all letters received in 1869) the first letter Molton wrote to us after leaving Galveston, dated May 8th, 1869, which will illustrate for itself the utter falsity of his now alleged employment of us in behalf of the other White's heirs for our judgment or decision on their rights, and I annex it to my deposition as Exhibit No. 1.

On the 4th of June, 1869, we received by express from Molton the conveyances to Ranger for the lots he had agreed to purchase, and on the 5th of June wrote to him very fully in reply, stating that we would not advise Mr. Ranger to accept the same as a sufficient title for the lots. The objections to the titles were fully stated, and suggesting mode of conveyance necessary to be obtained. I give extract from that letter:

"Can you not get from Mrs. Holtzclaw and her husband such a *a* conveyance, and, with the chances of recovery from the City Co., is it not best now to make the effort and to get it, and not to pay anything for it? That seems to us the cheapest and best way for you to proceed, especially if it is her understanding that her interest has been heretofore transferred to R. J. W.

"Is it not better now to pay her than to have to litigate with her with the prospects of her maintaining her interests in both estates?

We do not presume to advise, but if a purchase can be
232 made at reasonable terms it strikes us as your best plan to quiet her title.

"If the conveyance from Thomas W. Cowles cannot be found, is it not practicable and best also to get him to execute another relinquishment? Even if you pay a little for this it is better to do it than to have to bring a suit, and you do not reasonably expect to sell valuable city property on which men calculate on putting improvements five or six times the value of the property where there is a patent blemish in the title which it would take a lawsuit to cure. If the parties are poor and would wrongfully extort now from their own relatives rather than clear up your title, this renders it certain that as soon as a fine building goes up on the premises their claim comes forward and would have to be bought out or defended. The cheapest and best plan, in our judgment, is for you to clear up your title now by obtaining releases from those parties."

All this will show how impossible it is for Molton to state, with any regard to truth, that he employed us to represent the interests of the other parties, and not alone those of the Ware family.

I cut from my letter book and annex to my deposition as Exhibits No-. 2, 3, 4, and 5, the telegram No. 2 and letters received from Molton up to the transmission of the titles which were accepted by Ranger.

Molton says I expressed the opinion that the conveyance of Mrs. Holtzclaw and her husband did not convey her interest in the Galveston City Co. stock. This is true as to what he first sent to us as

her conveyance on his return to Alabama as above stated, but it is not true, so far as I have any remembrance, as to the effect of the conveyance which he subsequently obtained and sent to us. In a letter to Molton, dated the 4th of March, 1870, in response to his great solicitude for the earliest sale possible of the entire property for the benefit of Ware's estate in Alabama, I suggested that suit should be brought by the heirs of Ware and Mrs. Ware in the Galveston district court against David O. and Clement B. White, alleging the ownership of all the property by purchase from the other heirs of David White, and seeking a decree for its sale as not susceptible of partition, the interest of the Whites in the country lands to be assigned to them. I suggested if he could get acknowledgment of service in such a suit by Mr. and Mrs. Holtzclaw, Cowles, and Lumpkin, and acknowledgment that they had no interest in the White estates, it would be best to make them parties also, so that the decree might bind them and be complete in itself as evidence of the Ware title without reference to the conveyances. I suggested, if there should be a large recovery from the Galveston City Co. on account of stock, he would very possibly have to apprehend from Lumpkin and the others some controversy in which they
233 would seek to maintain that their sale of interest in the estates of David and Mary S. White was not intended to extend to the estate in Texas, but to the estate of which R. J. Ware was executor. We said that the claim to the Galveston City stock need not be sold; that it belonged to the Ware estate and Mrs. Ware and could remain in them. This letter was our best advice for immediate sale of all the real property in the best shape for the Wares, whom alone we represented or had any, the slightest, thing to do with. Molton replied by a long letter, dated the 23d of March, objecting to my plan and recommending me to obtain an act of the legislature of the State of Texas authorizing Robert J. Ware, as executor of Rob. J. Ware's will in Alabama, to make sale of all the property in Texas, which idea he urged on me then and subsequently very strongly.

He said that Holtzclaw and wife and Lumpkin and Cowles would urge that the similar instrument which they signed last spring covered the same ground; that they "specially mention the property in Texas; that they do not claim the remotest interest, present or future, having, in fact and in intention, sold to Dr. Ware all claims whatever and anywhere. In the instruments they give the authority to R. J. Ware, executor of R. J. Ware, to use their name for the recovery of all property of the White estate thus transferred by them."

Now, however, Molton testifies that I expressed the opinion, I believe in the language of his deposition, that the term "property in Texas" did not include the City Co. stock, which is purely an invention by him.

Subsequently our advice was that administration should be opened in Texas on the estate of Robert J. Ware, and that all the interest in the White estate, except that of David and Clement White, in the country lands, should be inventoried and duly sold at

administrator's sale, Mrs. Ware to give a power of attorney to sell her interest at the same time in conjunction. We said in letter April 7th, 1870: "As respects the claim against the Galveston City Co. on account of stock, that should be included in the inventory of your father's estate, but as a claim under investigation and the facts not sufficiently known to enable any estimate to be made, or if omitted altogether it might be best, as in the event of suit we may prefer to recognize the right of action as in Mrs. Ware and the other devisees of D. White's estate."

Mr. Molton makes the question of parties in whose name the suit should be brought a matter decided, I believe, when he was in Texas in April, 1869.

The above is the first allusion to it, in no way based on any admission of right on the part of the other devisees, but, as matter of policy, having express authority to use their names for the benefit of Ware's estate.

234 Not a syllable of correspondence ever occurred between B., J. & M. and any one of the other heirs, which we would, of course, have had with them if we had had the slightest impression that we were in any way in their employment or acting for their interests.

The expression of "White's heirs" is frequent in the letters, more so that Ware's heirs or Ware's estate, as a convenient and more appropriate designation; certainly perfectly understood between us as relating to the claim of purchase from a portion of the heirs.

Molton, in his deposition, represents me as having expressed the opinion in the spring of 1869, when he was in Galveston, that, although there had been a great lapse of time, it would not prove a practical difficulty, as the circumstances would, no doubt, take the case out of the ordinary operation of the statute of limitation, and the correspondence with Dr. Ware and other parties would sufficiently explain what might otherwise be construed laches; that I considered the principle different from that involved in the Scott case and would just as jealously urge my opinion in the one case as in the other, and that I was positively employed to bring the suit, and undertook to do so.

This is a whole series of most extreme falsification. I never expressed the opinion that suit could be maintained, and I never undertook to bring suit. From the beginning, throughout, I expressed the belief that, even if it turned out to be true that transfers were made of the stock by Lipscomb, as attorney, after White's death, the stock had been cancelled for full value paid, and adversely held by the company ever since, of which Ware and all other parties had notice, and too great time had elapsed and too many changes in rights had been affected for limitation and laches not to apply. The only question of doubt which I suggested was as to Mrs. Ware; but the stock was personalty, for which I supposed, by the law of Alabama, the title and right of action were cast in her husband, and, her husband having paid $50,000 for an insolvent estate, she, as heir to that insolvent estate, could not equitably recover. These were points as to her claim. I did not critically examine them.

But my impression was adverse to her right to recover also, though it was left as an open point, unless the supreme court should make a decision in the Scott case that the rights of a stockholder in a corporation were such that no act of the corporation adverse to the stock, in repudiation and destructive of it as far as it could possibly destroy it, for its value, fully paid, could be held to be adverse to the stockholder so as to bar her rights; or, I will add, unless I should change my own views of the law, my statement was express that I did not believe suit could be maintained. All that I did was to agree that I would endeavor to find out whether the transfer of White stock was illegal, and, if so and the court should make a decision in the Scott case which was encour-
235 aging to a hopeful result, I would advice them of the fact. If so, I presumed I would be employed; but not a word was said about a fee—its amount, who was to pay it, or anything on the subject whatever—nor was either party bound for said employment.

Molton's first letter, written May 8th, directly after leaving Galveston, shows that the only question which I had left as an open one on his mind was as to Mrs. Ware, to which he thought Mrs. Holtzclaw's claim assigned to Ware could then be added.

April 14, 1870, Molton wrote: "When in Galveston last spring your impression was that the statute of limitations had already barred the claims of all but Mrs. Ware."

May 30, 1873, Moulton wrote to us as follows: "On the 6th of July, 1872, I received my last letter from your Mr. Ballinger, giving an opinion that limitation was a bar to the claims of the heirs of David White against the Galveston City Company for stock improperly transferred to others in the company's book. He stated, however, that the supreme court, then in session, would decide a similar case upon the subject of limitations, which would go a long ways toward settling the question in this claim. Has said court ever yet rendered a decision in said similar case, and was it in favor of the bar or against it? If they settled that a bar was not completed, what would be your advice as to the best course to be pursued against the Galveston City Company in respect to our claim?"

In the 41st cross-interrogatory to Molton extracts are given from some of his letters, the correctness of which he acknowledges, and they show his then understanding of the matters referred to.

Sept. 8, 1870, he inquires whether "the supreme court has decided the question about limitation which involves the same principle that we are interested in." This, of course, was his then construction of my view of the two cases.

April 18, 1871, he says: "Has the supreme court not yet decided the question upon the statute of limitation which it was thought by Mr. Ballinger would have a large bearing in deciding whether our claim against the Galveston City Company will amount practically to anything?"

March 7, 1872, after again inquiring about the decision, he says: "In a word, do you think, all things considered, these will ever amount practically to anything?"

July 1, 1872, he again refers to the case before the supreme court as involving "the same question of limitation."

June 14, 1873, he says: "I wanted to know whether a decision by your supreme court had been made in the case that your Mr. Ballinger thought would have a large bearing in determining whether to advise us to bring suit against the Galveston City Company."

This last extract is expressen with precision as to the exact fact; not that I was employed to bring suit or undertook to bring
236 suit, but when the supreme court made the decision, then I would advise them as to bringing of such a suit; but now it suits Molton, for some supposed object in this case, to represent me as advising in April, 1869, that limitation did not present a difficulty in the way of suit; that I was ready to argue with the same zeal that limitation did not apply in the White case as that it did apply in the Scott case, and that I positively accepted employment and undertook to bring the suit and was employed for Mrs. Holtclaw, Cowles, Lumpkin, and the two Whites equally with the Wares, the truth of all which I again reiterate my denial of most positively.

A word more as to identity in principle in the two cases. The Scott suit was brought on the sole theory that the White certificate owned by Scott was *ipso facto* a certificate of the organized Galveston City Company, and that its holder became a corporator in the new company, and that the company by no adverse act whatever could destroy his right to the stock. It is true the defendant's case had two aspects, first, a denial that the Scott share ever was or was intended to be recognized as a share in the new company; and, second, if so, however, the defense of limitation and laches arising from the fact that its entire stock had been absorbed by a full issue of other shares, which had alone constituted the stock of the company, the holders of which had possessed White stock. The similarity, if not precise identity, between the two cases, especially in its latter aspect, on which alone the Scott recovery could have been anticipated, will be perceived.

It is proper to remark, also, that my attention to the Scott case and the question it involved did not relax. The case had been submitted to and argued before the military reconstruction supreme court prior to my interview with Molton in the spring of 1869. In 1870 a new supreme court, under the constitution of 1869–'70, was organized, and the case was reargued before that court. It was not finally decided until 1875 or '76 by the supreme court appointed under the constitution of 1875. The court held that the White stock was not stock of the Galveston City Company, and that the door was closed to become such by May, 1841; but the court said such a suit now, or in the alternative for damages after the lapse of more than twice the length of our longest limitation, and after nearly every person is dead, who, if alive, could make plain what must now be dimly seen, must be held to be barred as a stale demand.

About the — day of Nov'r, 1871, I was applied to by Wm. H. Goddoard, a former lawyer of high ability and character in this city,

but retired from active practice, then a director in the Galveston City Company, with an offer of employment of my firm, Ballinger, Jack & Mott, in all the pending litigation of the company and as its general counsel. The only employment up to that time which I had ever had by the City Company, to the best of my recollection and belief, was in two suits, one of them brought in favor of
237 the company in 1859 or 1860 against the corporation of the city of Galveston to set aside and cancel a deed made by the company to the city, conveying a half block of lots at the foot of Tremont street, made as the consideration for the settlement of what was known as the controversy relating to the "flats" in front of the city, in which the City Company had a large interest, but the compromise was not adopted or accepted by the city. In that suit Ballinger & Jack were employed in conjunction with Messrs. Allen & Hale, and for the same fee, specially agreed upon. The other suit was the suit of the Scotts against said City Company, already referred to, based upon the following state of facts in substance:

In Dec., 1836, an act was passed by the congress of the Republic of Texas to relinquish to M. B. Menard and his associates the league and labor of land on the east end of Galveston island, the present site of the city of Galveston. Menard had a previous claim of title. He was to pay the government $50,000, to be evidenced by the receipt of some authorized agent of the government, and David White was designated in the act as an agent to receive the funds.

Immediately on the passage of the act Menard arranged with White to accept for him or certify his payments; also that White was to have some power or agency in selling the stock of the projected city of Galveston and a commission of ten per cent. on all sales of its stock, and he gave to White a mortgage on the property for the repayment of the $50,000 and for the ten per cent. commissions. After this White undertook to issue stock in the city of Galveston, in Mobile, Alabama, and make sale of the same. The Scotts became the owners of one of these shares. Menard repudiated White's right to do so, and subsequently conveyance was made at Richmond, Va., by Menard and one Triplett, who claimed an adverse title to 640 acres of the land, to trustees, under which the Galveston City Company received the organization under which it subsequently acted, and its stockholders became an incorporated body. The conveyance made by Menard and Triplett to trustees contained a provision, the effect of which, as contended by the plaintiffs, Scott, was to make their share of stock *ipso facto* a share of stock in the latter City Company and its holder one of the corporators therein.

The City Company denied that construction of the trust deed; insisted that the effect of the provision was simply to empower adjustment to be made with holders of the White stock; that such adjustment had been made as to all shares recognized as equitable, and the entire body of the full number of authorized shares in the company had been alone the shares issued by the trustees appointed at Richmond, and that all claim and right on the part of Scotts was barred by limitation and laches.

Wm. G. Hale, Esq., was employed by the Galveston City Com-

pany to defend this suit. Some months thereafter, owing, as
238 I believe, to distrust of Mr. Hale on account of irregular habits into which he had fallen, my firm was employed also in the defence of the suit at a specific fee.

These were the only cases or business in which I had ever been employed by the City Company. The case of Edgar *vs.* The Company, to which some reference has been made, was pending when I became a paraner of Jones & Butler, and they (or Mr. Butler, perhaps, alone) were attorneys of the company. But my connexion with them involven no connexion with the case. In the absence of both of them, some letter written by me giving information in regard *io* it, sought by the company, has been referred *so*, but that was such an act as I would have performed in any matter of their own business which I could do in their absence. The suits between the city of Galveston and the wharf owners, in which I had been employed by the latter, involved questions in which the City Company felt deep interest, but it was not as party, and it had nothing to do with employment of counsel.

I was informed by Mr. Goddard as to all the litigation in which the company was then involved:

First. The case of Edgar against it, a claim to the entire city site, but it had been to the supreme court and was substantially settled in favor of the company.

Second. The case of Hardin's heirs against the company, invoiving a large number of shares of stock, which Mr. G. said was thoroughly prepared and ready for trial, by himself, and we were only to give him aid in its future conduct.

Third. A suit was brought by the State of Texas to recover an alleged excess of about 1,700 acres in the grant to the city. In the defence of this suit Hon. Peter W. Gray, a very able lawyer, had been employed, and was to continue as leading counsel.

Fourth. The Scott case, in which we were already employed.

Fifth. A suit by Phillips similar to the Scott case.

Sixth. Two suits by Mrs. Lipscomb, widow and oxecutrix of A. S. Lipscomb, deceased, claiming a large amount of stock in the company, owned by him in his own right and in connection with others, and seeking discovery from its records.

Seventh. Two suits by the administrator of Mrs. Groce alleging a gift by delivery of three shares of stock to her by Judge A. S. Lipscomb in his lifetime—that she had lost them, but was their owner—which would be exhibited by the books and records of the company, if produced, but the company refused to permit their examination.

I think the above include all of the litigation of the company then depending. Most of it had been recently brought. He said that the company had not had occasion for the services of a general attorney owing to the fact that Judge Cole, its regular agent, was a lawyer and himself also a director.

239 In the conversation which took place with Mr. Goddard I informed him of what had transpired between Mr. Moulton and myself with reference to my employment to recover from the company a number of shares of stock which had issued to David

White by the company, based on the belief of the parties that Lipscomb, as White's agent, had conveyed shares subsequently to White's death, as to which fact I wished to ascertain, or as to the lawful and valid transfer of the stock; and if I could so ascertain, and from the decision which might be made in the Scott case by the supreme court, or otherwise, I believed the case could be maintained, I expected to bring a suit against the company therefor, and if we were employed it was to be with the full understanding of that fact. Precisely how far I stated the nature of the White claim I do not remember, but I think I stated it.

Mr. Goddard was most distinctly and accurately informed of the claim, and my employment was with that distinct understanding.

My own recollection is very clear that either at that — time I said to him that *in* those Lipscomb and Groce cases then pending against the company would enable and in fact oblige me to examine Lipscomb's connection with and transfers of all the White stock—the very thing I desired to do in the investigation of the claim against the company. Mr. Goddard seems not to remember this conversation. It may have occurred at a little later day, when I became better posted as to the nature of these cases. I cannot be mistaken that it did occur; and my strong impression is that it occurred as part of our interview with reference to our employment as hereinbefore stated. The fact, however, was a manifest one that examination of the records of the company to show transfers made by Lipscomb involved the transfers by him of the White stock.

That examination I afterwards made in conjunction with Judge Cole, the agent of the company, with reference to the Lipscomb and Groce cases, looking carefully, I believe, at every share of stock which issued to David White and to every one on which Lipscomb's name appeared. The date of it I cannot give.

The wife of Col. James Love was my father's sister. By marriage he was my uncle. I came to Texas when a boy, at his invitation; resided at his house until my own marriage, and felt the strongest attachment and obligation to him. He was a man who had held large agencies for investments and dealings in Texas in early time, especially in the debt, and had acted under the belief that the annexation of Texas to the United States would take place at some early date, and that the public debt of Texas would be paid off by an European loan; had believed himself possessed of a great fortune; was of sanguine, generous disposition; had great ability for affairs, but was not exact or orderly in business. He met with reverses, became embarrassed, unable to pay his debts or to fulfil some of his obligations. At the same time, I have known no man in my experience of life, according to my judgment, of higher veracity or less capable of intended injustice or wrong.

I had several conversations with him about the White stock he had received from Lipscomb, some of which were before and some subsequent to my employment by the City Company in the Lipscomb and Groce cases, the effect of which left no doubt on my mind that the allegation of transfer of the stock after White's death to him could not be proved by him.

July 6th, 1872, in answer to inquiry by Molton about the Scott case in his letter of July 1st, from which extract has been given—and he alludes to it as involving "the same question of limitation"—I wrote to him that no decision had been rendered; that decision was expected during that month, and that "my own opinion as a lawyer is that after the lapse of time which has occurred limitation is a bar."

On the 17th of June, 1873, B., J. & M., in a letter by me, wrote to Mr. Molton that "very careful and thorough examination of the subject had satisfied us without doubt that the heirs of David White could not recover." This letter and a second copy of it was received by Mr. Molton.

I considered this a final decision of the matter on our part and termination of our connection with it.

In the meantime I had looked at the records of the City Company and had conversed with Judge Love. From the date of that letter forward we received no letter nor intimation of any kind from Molton or any one else that he did not recognize the above statement as a finality respecting all discussion or business between us as to the White stock. There was never any further allusion to White stock, the Scott case, or anything upon the subject between us. This, however, Molton denies in his deposition and says that he considered us as still investigating the matter and keeping it under discussion between us until some time in 1878. Our letter books contain copies of all letters written by us unless from some accidental cause there was a failure to make a copy. It has been our habit always to have the letters received during each year bound soon afterwards in volumes, which we now retain. I have examined, and no letter was written to Molton and none received from him after that date in regard to the White stock. He says he received a number of such letters from me, and also from Col. Jack, but has lost them. I feel the utmost certainty that no such letter or letters was ever written or can be produced, nor was any further letter written by him to us in regard to the White stock. Our letters to him bear date June 19 and 30, July 21, July 28 in 1873, January 24, April 7 and April 24 in 1874, and Dec. 5 in 1878. He wrote to us June 28, 1873, and in 1874, January 31, April 20, May 22, and in 1877, Sept. 28, and Dec. 10 in 1878.

Mr. Molton gives in his deposition an additional extract from the letter of June 17, 1873, as follows:

241 "Let us hear from you on the subject of this at your earliest convenience. Get Trueheart out of difficulty and we will aid in everything else."

This necessitates a further explanation. As I have stated, my acquaintance with Molton commenced in a visit by him and his brother-in-law, Ware, who was the executor of Robert J. Ware, deceased, to Galveston, their object being to render available in the earliest manner possible, for the benefit of Robert J. Ware's estate, all the property owned by David White at his death in Texas, except the part devised to Daniel and Clement White. Sale was made to Ranger, on account of which we remitted to the executor of R. J.

Ware $6,000, gold, less, perhaps, Trueheart's commissions for the sale. Afterwards, as there were certain minor heirs of Robert J. Ware, in order to make sale of the remainder of the property, we advised administration to be opened in Texas on the estate on said Ware, and Trueheart became the administrator. Certain creditors against his estate, at Molton's suggestion, presented their claims to the administrator here. Trueheart made further sales aggregating, I suppose, with the $6,000, the amount of $14,000, stated by Molton in his deposition to have been remitted to the executor of Ware from Galveston. This was remitted by the administrator here to the executor in Alabama under representations by Molton of the extremest urgency for the funds by the executor there to save the estate from disaster, and Molton was relied upon to see to such application of the funds and such voucher to Trueheart as would protect the administrator here. Subsequently Molton advised us that the executor in Alabama had misapplied the funds remitted to him, and that nothing whatever had been done to protect Trueheart for his remittances, and it became a matter of very great concern as to the responsibility he might have incurred.

Molton became also very urgent for allowance and remittance to him of a cash fee for services to Ware's estate. I had written with great anxiety to Molton about the Trueheart matter. His reply was most unsatisfactory, and my letter to him of the 17th of June, 1873, was largely taken up with that subject, and the extract from my letter requesting answer from him at his earliest convenience and to get Trueheart out of difficulty and we would aid in everything else had relation to the above state of facts and none whatever to the matter of the stock, as to which I had written him, as I considered, finally and definitely, and our subsequent correspondence principally related to the same subject of protection to Trueheart and his fee.

Molton says in his deposition that I told him in Galveston, in 1869, that I would unseal the books of the City Company if it required the *posse comitatus* to do it. This is a piece of his own rhetoric. My information was, and from Molton himself, that Lipscomb's heirs would intervene in the then pending suit to claim the lots we had sued for, and I said that this would enable us to exam-
242 ine the agent of the City Company, and by this means we could obtain sight or copies of the transfers of the White stock. Such was my expectation. No power under our statute then existed to take the deposition of a witness residing in the county of the age and health of Judge Cole, the agent of the City Company, and I had to obtain an oral examination in court. Molton and the executor were most anxious to make the lots involved in that suit available, and Lipscomb's heirs did not intervene or set up claim to them—the result, as I believe, of my placing before Major McLemore a full statement of the White title to them. The party in possession ceased to claim them adversely, and Trueheart took control of them, administered and sold them as part of Ware's estate, and the further prosecution of the suit became needless.

Molton, in his deposition, puts into my mouth, in the spring of

1869, much of his own present inference, argument, etc., as to the acts of Lipscomb, suspicion against the City Company, etc., which has no foundation in fact. There was but one ground of suspicion so far as was ever suggested by him or that occurred to me, and that grew out of the copy of receipt from Love to Lipscomb, dated in March, 1842, for, I believe, 32 shares of stock, and that these were White shares, then untransferred, and not transferrable by Lipscomb as attorney, White having died. This was the matter of fact to be ascertained, and, if true, what circumstances existed to affect its character, legal and equitable? As to any intended fraud or wrong against White or White's estate by Lipscomb or Love or by officials of the City Company, no conjecture or suspicion of it was ever expressed or ever felt by me, and all statements to the contrary imputed to me have no foundation whatever.

Molton says in his deposition that Ballinger, Jack & Mott or myself informed him that Lipscomb had left an insolvent estate or was insolvent at his death. This is wholly untrue. I knew the contrary. I supposed him to have been in embarrassed circumstances and unable to pay his debts when he left Alabama, and for years subsequently; but that at his death and for years before his affairs were independent and easy, and no other statement was ever made or opinion expressed to Molton.

Some time in 1878 the heirs of the first Mrs. Lipscomb brought suit against a number of the purchasers of the lots which had been sold by Trueheart as administrator of Robert J. Ware's estate, and the money remitted, as I have before stated, and, I believe, for other lots of the 32, claiming interest in them; and Mrs. Lipscomb, executrix of A. S. Lipscomb, deceased, intervened, also claiming interest in these lots, some of which suits we were employed to defend. I felt special interest in their defence, having been connected, as heretofore shown, with administration upon them and sale. The papers received by me from Molton, including those obtained
243 by A. F. James, were still in my hands uncalled for, and were critically examined by me for the purpose of defending the titles which had been conveyed by Ware's estate.

The claim in right of the heirs of the first Mrs. Lipscomb was to a community interest on her part in the 32 lots, or such of them as were sued for, bought by Lipscomb and White from the Galveston City Company in 1838, the claim being that the acquisition of this property was governed by the law of Texas, the first Mrs. Lipscomb, then living, entitled to community in it, and the sale by Lipscomb made subsequent to her death.

My defence to this claim was in part contained in the above papers: 1st, statement by Lipscomb himself that he was a partner with White in the stock of the Galveston City Company; that his stock was personal property, issued before Lipscomb's removal to Texas, when a citizen of Alabama; its acquisition, therefore, governed by the laws of Alabama, and his wife no community in it; that the stock itself was sunk in and exchanged for the lots, and the lots, therefore, were governed by the same marital law that the stock was, and the wife no community interest in them; 2nd, that Lips-

comb was at the time of his first wife's death in embarrassed circumstances, as shown in his letters and the sale necessary to his affairs, and the heirs of the wife could not claim the community. Careful answer embodying this defence was prepared by me and shown, with the facts on which it was based, to the counsel suing, resulting in an easy settlement of some of the cases, in which I in fact charged no fee on account of my own sense of duty as connected with the titles. Some of the cases are still pending. The estate of my wife's mother owns a part of block 370, which was included in the 32 lots.

When I was called on by Mr. Coryell for the papers I stated that I should claim the right to all use of the papers proper to protect these titles. I made further inquiry and took additional evidence in those cases to show Lipscomb's partnership interest in the Galveston City Company stock. In the Scott case I became fully informed as to the fact that in White's effort to set on foot and establish the Galveston City Company and issue its stock, and in his controversy with Menand, Lipscomb was White's lawyer and managed the matter for him and came to Texas for him before his removal and effected the settlement with Menard by which the ten per cent. on the stock of the company was obtained as commissions to White.

When the bringing of this suit was determined upon I deem it proper to say that no tender or suggestion of employment of myself or my firm in it was made, nor was there allusion to it in any manner.

Being, of course, well aware of the connection I had had with the claim for the Galveston City Company stock, it was a matter of consideration with me whether any fact existed rendering it proper for me not to undertake its defense as the *as the* counsel and attorney of the City Company. I did not believe there was any fact or
244 reason why I should not, but that my duty to the company required it. I heard of no objection to it until after the argument of the demurrer. When the answer had been put in, Judge Mann informed me that Mr. Molton thought there were statements in the answer obtained through my possession of the White papers and that ought not to be availed of. I do not remember that he specified the particulars, but I understood or inferred that Mr. Molton was dissatisfied with my action. This has led me to give much more detailed explanation than I should otherwise have done. In fact, should not have thought of testifying in the case but for the introduction of that feature into the case. I think it not improper to say that my compensation by the City Company has not been increased a dollar with reference to or on account of the case, and that in acting as lawyer in it I have not had reference to any fee or addition to fees therefor; and that believing, as I do, that I appreciated the duties and obligations upon me as an honorable lawyer growing out of the connection I had with the subject, I think no motive could have induced their conscious violation.

Molton says some of the papers he delivered to me were not returned. There were several copies of some of the papers. A. F.

James seems to have sent copies to White of papers of which he obtained copies from Lipscomb's attorneys, and to have retained copies. In preparing the cases which I have referred to some of these duplicates or triplicates among the papers of A. F. James may have been taken out of the bundle of White papers and not returned, or may have been put with the papers of James' estate; which papers I turned over several years ago to Geo. J. Butler. Possibly others may have been misplaced; but as to any withholding of any of the papers, it is not true, and I can imagine no motive for such a purpose, so far as any suggestion or intimation has ever been made of the character of said paper or papers. The letters referred to in my deposition are all in my letter books and are subject to the inspection of the opposite counsel and to the use as evidence of any parts of them deemed material.

So far as extracts are made from letters to Molton or reference to them, notice is given to the complainants for the protection of the originals.

Sworn to before me by W. P. Ballinger.
July 12th, 1883.

WALTER L. HANSCOM.
Deputy Clerk, U. S. Circuit Court, E. D. T. D.

ASENATH A. WARE and Others
vs.
THE GALVESTON CITY CO.

In the Circuit Court of the United States, Eastern District of Texas, at Galveston. In Equity.

It is agreed by the counsel in the above cause that on the trial thereof the following documents shall be considered as proved
245 and may be offered in evidence by the defendant, subject to all objections to the relevancy, admissibility, or competency of the said evidence, to wit:

First. Copy of mortgage from Michael B. Menard to David White, dated the 10th of Dec., 1836, and of the certificates to and record thereof, the same being Exhibit (A), on pages 6 and 7 of the printed Record of the case of The Galveston City Company, appellant, against Thomas J. Scott and others, appellees, in the supreme court of Texas.

Second. Exhibit C, contained in the said printed record, the same being a form of certificate of stock issued by David White as the same imports; said printed Record, pages 8, 9, 10, 11, and 12.

Third. Papers numbers 1, 2, 3, 4, 5, 6, 7, and 8; also paper signed M. B. Menard, on pages 80, 81, 82, and 83 of said printed Record.

Fourth. Copies of the wills of David White and Mary S. White, probated in Alabama and recorded in the Galveston county records, or an abstract of the disposing or devising part thereof so far as the same is necessary for construction of the effect thereof in devising or disposing of the rights claimed and in controversy in this suit. Agreed that S. W. Jones, one of complainants' counsel, shall make

said abstract, subject to any objection to the court for insufficiency thereof.

Fifth. Copy of power of attorney from David White to Abner S. Lipscomb, made 8th of April, 1839, and of the certificates thereto from the Galveston county records, Book A, page 68, a copy being annexed hereto, identified by the signatures of C. Dart, U. S. examiner in equity.

Sixth. Certified copies from the Galveston county records of instrument signed J. T. Holtzclaw, Mary B. Holtzclaw, and D. P. Lumpkin, to Robert Y. Ware, executor of R. J. Ware, deceased, recorded Book 3, page 584.

Instrument between same parties, recorded Book 2, page 251.

Instrument from Thomas W. Cowles to Robert Y. Ware, executor of R. J. Ware, deceased; recorded Book 2, page 31.

Copies of said instruments certified from Galveston county records to be filed with this agreement.

Seventh. Transcript probate proceedings on estate of David White, from Austin county, Texas.

Eighth. The original record of suit of White's administrator against Menard and others, in the district court of Galveston county, removed to Harris county, and papers therein, may be produced and given in evidence, so far as material, by plaintiffs.

Ninth. Memorial of M. B. Menard to Galveston City Company and action thereon by the company, on pages 77 to 80, inclusive, contained in the printed Record of the proceedings in the case of Scott *vs.* Galveston City Company, and referred to hereinbefore as containing certain exhibits named, and to be read as evidence in this cause.

246 It is agreed that in *line* of Exhibit "C," mentioned in clause "second" hereof, an original form of the David White issue of stock is hereto attached and marked as Exhibit "C" to this agreement, to be read in evidence as such.

MANN & BAKER,
M. C. McLEMORE,
Counsel for Complainants.
BALLINGER & MOTT,
Counsel for Defendant.

UNITED STATES OF AMERICA,
State of Alabama, City and County of Mobile.

Know all men by these presents that I, David White, of the city of Mobile, have and by these presents do make, constitute, and appoint Abner S. Lipscomb my true and lawful attorney-in-fact for me and in my name to alien, release, assign, and convey any or all of my Galveston stock or any stock or interest I may have in the city of Galveston, on Galveston island, in the Republic of Texas, or any real estate or town lots I may be entitled to, in law or equity, in the town of Matagorda, in the said Republic of Texas, hereby ratifying and confirming the acts of my said attorney-in-fact, which he may do, execute, or perform in as full and ample manner as I could myself if personally present.

[SEAL.] In testimony whereof I have hereunto put my hand and seal this the 8th day of April, A. D. 1839.

DAVID WHITE.

(Witness:)
DAVID FILES.

District Court of the United States for the Ninth Judicial Circuit, Southern District of Alabama, April Term, 1829.

Personally appeared in open court David White, who acknowledged that he signed, sealed, and delivered the within power of attorney for the purposes therein specified.

In testimony whereof, at office, in the city of Mobile, I have hereunto set my hand and official seal this the 8th day of April, in the year of our Lord one thousand eight hundred and thirty-nine.

DAVID FILES,
Clerk C. S., S. D. A.

247 [SEAL.] I, William Crawford, judge of the United States for the northern and southern district of Alabama and associate judge of the circuit court of the United States for the ninth judicial circuit and southern district of Alabama, do hereby certify that David Files, who has signed the above attestation, is clerk in said court, and that his said attestation is in due form of law.

WM. CRAWFORD.

Filed 22d and recorded 23d of April, 1839.

OSCAR FARISH,
C. C. C., G. C.

(Book A, page 68.)

REPUBLIC OF TEXAS, }
County of Austin. }

To the Hon. Edwin Waller, chief justice and judge of probate in and for said county:

Your petitioner, William B. Lipscomb, a citizen of said county, represents that some time since David White departed this life leaving no will in this Republic, as your petitioner believes; that heretofore no administration has been had of his estate, and that he has property and claims to some considerable extent in this Republic, the greater portion of which against citizens of this county, which cannot be settled without an administration is had.

He therefore prays your honor, the premises considered, to grant to your petitioner letters of administration on said estate of David White, deceased; and he, as in duty bound, will ever pray, etc.

WM. B. LIPSCOMB.

The probate clerk will advertise on the foregoing petition.

EDWIN WALLER,
Probate Judge, A. C.

Filed July 27th, 1844.

J. HILLYARD, *P. C., A. C.*

Advertised day and date above.

J. HILLYARD, *P. C., A. C.*

REPUBLIC OF TEXAS,
County of Austin.

Having read and considered the foregoing petition, it is ordered, adjudged, and decreed that letters of administration issue as asked for by petitioner upon his complying with the law.

San Felipe, August 26th, August term, in open court.

EDWIN WALLER,
Probate Judge, A. C.

248 REPUBLIC OF TEXAS,
County of Austin.

Be it known that Wm. B. Lipscomb has this day been appointed by the probate — of said county administrator of the estate of David White, deceased; and the said Wm. B. Lipscomb having complied with the law in such cases, faith and credit are due all his legal acts as administrator aforesaid.

Given under my hand and the seal of the probate court
[SEAL.] of said county, at San Felipe, this August 26th, A. D. 1844.

J. HILLYARD,
Probate Clerk, Austin Co.

Issued August 26th, 1844.

J. HILLYARD, *P. C., A. C.*

REPUBLIC OF TEXAS,
County of Austin.

To citizens Jas. A. McWaters, J. G. W. Mott, and Leonard W. Groce:

You are hereby appointed to make out an estimative inventory of all the property belonging to the estate of David White, deceased, and due return make to the probate court of Austin county as the law directs.

Given under my hand and the seal of the probate court
[SEAL.] of Austin county, at San Felipe, this 26th day of May, A. D. 1845.

J. HILLYARD,
Probate Clerk, Austin Co.

Issued August 26th, 1844.

J. HILLYARD, *P. C., A. C.*

REPUBLIC OF TEXAS,
County of Austin.

Know all men by these presents that we, William B. Lipscomb, as principal, and Abner S. Lipscomb and Barry Gillespie, as securi-

ties, are held and firmly bound unto Edwin Waller, probate judge of said county, and his successors in office in the sum of six thousand dollars, good and lawful money of this Republic, well and truly to be paid; for the payment of which we bind ourselves, our heirs and assigns, jointly and severally, firmly by these presents.

The conditions of the above bond are such that whereas the above-bound William B. Lipscomb has this day been appointed administrator of the estate of David White, deceased:

Now, if the said William B. Lipscomb shall well and truly do and perform all the duties that are or may be required of him as administrator aforesaid and fully comply with the law in such cases, then the above bond to be null and void; otherwise to remain in full force and effect.

249 In testimony whereof we have hereunto set our hands and affixed our scrolls by way of seals, at San Felipe, this August 26th, A. D. 1844.

WM. B. LIPSCOMB. [SEAL.]
ABNER S. LIPSCOMB. [SEAL.]
B. GILLESPIE. [SEAL.]

Attest: STEPHEN E. TIPPETT.
EDWIN WALLER, JR.
THOS. P. HUNT,
W. J. SMITH,
For B. Gillespie.

You swear that David White, deceased, died without any lawful will, so far as you know or believe, and that you will well and truly administer all and singular the succession of the said deceased so far as the same may come to your knowledge, and render a true inventory and account of sale, *et cetera*.

San Felipe, August 26th, 1844.

WILLIAM B. LIPSCOMB.

Sworn to and subscribed before me day and date above written in open court.

J. HILLYARD, *P. C., A. C.*

The foregoing bond has been approved by me.

San Felipe.

EDWIN WALLER,
Probate Judge, A. B.

Filed May 26th, 1845.

J. HILLYARD, *P. C., A. C.*

From Minutes B, page 143, April Term, 1853.

It is ordered, adjudged, and decreed by this court that the clerk notify all administrators, executors, and guardians who have not made to this court their annual exhibits by citation to come forward and make settlement as the law requires.

THE STATE OF TEXAS, }
County of Austin. }

To the sheriff of Washington county, Greeting:

You are hereby commanded to cite William B. Lipscomb, as the administrator of David White, deceased, to be and appear at our hon. county court of Austin county on the last Monday of the *ninth* of May, 1853 (sitting in matter — probate, *et cetera*), then and there to render unto the said court an exhibit of the condition of the estate of David White, deceased, of which he is the administrator and of which he is required to do under the law as well as by order of this court, at the April term, 1853.

Given under my hand and the impress of the seal of
[SEAL.] said court, at office, in the town of Bellville, the 29th April, 1853.

JAMES A. RAILEY,
C. C. C., A. C.

Received May 15th, 1853.

J. H. DAY,
Sheriff, W. C.

250 Executed by personal service of Wm. B. Lipscomb May the 18th, 1853.

J. H. DAY,
Sheriff, W. C.

Filed June 7th, 1853.

JAS. A. RAILEY,
C. C. C., A. C.

In County Court, April Term, 1853.

THE STATE OF TEXAS, }
Austin County. }

Wm. B. Lipscomb, appointed administrator of the estate of David White, deceased, respectfully represents unto the hon. county court of said county that from the time of his appointment as administrator of said estate, to wit, on the 26th August, 1844, no property belonging to said estate has ever been discovered by him nor does he believe from all the information that he has had subsequent to said appointment an inventory can be made out, there being nothing by which he can ascertain that the said David White, deceased, was in the possession of any property whatever; wherefore he prays this honorable court will accept his resignation as administrator of said David White, deceased.

F. LIPSCOMB,
For Petitioner, Wm. B. Lipscomb.

Filed May 30, 1853.

JAMES A. RAILEY,
C. C. C., A. C.

(From Minutes B, page 146, May Term, 1853.)

Succession of DAVID WHITE.

In the matter of the representation and application of the administrator of said estate, Wm. B. Lipscomb, and also presenting his resignation; the court therefore releases the said administrator upon his paying all costs.

THE STATE OF TEXAS, }
County of Austin. }

I, Z. W. Matthews, clerk of the county court in and for the county and State aforesaid, do hereby certify that the above and foregoing is a true and correct transcript of all the proceedings had in the estate of David White, deceased, as the same appears of record and on file in my office.

In testimony whereof I hereunto sign my name and
[SEAL.] affix the impress of my official seal, at office, in the town of Bellville, this 25th day of August, A. D. 1882.

Z. W. MATTHEWS,
Clerk C. C., A. C.

Know all men by these presents that we, the undersigned, as legatees and heirs-at-law of David White, did, upon a valuable consideration, release, by Robert J. Ware, all right and interest in the estate of David White in all property in the State of Texas and all interest we might have to said property as heirs-at law or legatees of Mary S.
White, widow of David White. We agree that Robert Y.
251 Ware, executor of Robert J. Ware, may use our names, as heirs of said White, in any manner that may be necessary to secure said property or the claim of said Ware as executor thereto without incurring any cost on ultimate hostility in us.

Given under our hands and seal this the 18th day of June, A. D. 1869.

——— ———.

Personally appeared before me, George Ely, probate judge of above county, E. G. Carew, who states on oath that he saw the grantors subscribe the same, and that he and the other witness signed the same as witnesses at the request of the said grantors.

GEORGE ELY,
Judge Probate Court, Montgomery County, Alabama.

I, George Ely, certify that I am judge of probate court of above county, which is a court of record, and that I am *ex officio* clerk and keeper of the records of said court; and I do further certify that the above attestation is in due form and by the proper officer and is entitled to full faith and credit.

Given under my hand and seal of office, at office, in the city of Montgomery, in the county of Montgomery, in the State of Alabama, on this 22d day of June, A. D. 1869.

GEORGE ELY,
Judge Probate Court, Montgomery County, Ala.

Filed July 2d, 1869, at 10.30 a. m.
Recorded July 5th, at 12 m.

WM. MILLER, *Clerk*,
Per JOHN H. YOUNG,
Deputy Clerk.

I, P. S. Wren, county clerk in and for the said county of Galveston, do hereby certify that the above and foregoing is a true and correct copy of a release from David White by heirs to R. J. Ware, bearing date the 18th day of June, 1869, as the same appears of record in my office, in records of deeds, etc., Book Z, pages 584 and 585.

In testimony whereof I have hereto set my hand and affix- my official seal, at my office, in the city of Galveston, on this the first day of December, 1882.

P. S. WREN,
County Clerk, Galveston County.

THE STATE OF ALABAMA, }
Montgomery County. }

Know all men by these presents that whereas heretofore we, the undersigned, as legatees and heirs-at-law of David White, did, upon a valuable consideration, release to R. J. Ware all right and interest in the estate of David White in all property in the State of Texas and all interest we might have to said property as heirs-at-
252 law or legatees of Mary S. White, widow of David White, we agree that Robert Y. Ware, executor of Robert J. Ware, may use our names, as heirs of said White, in any manner that may be necessary to secure said property or the claim of said Ware as executor thereto without incurring cost or ultimate hostility in us.

Given under our hands and seals this the 18th day of June, A. D. 1869.

J. T. HOLTZCLAW. [SEAL.]
MARY B. HOLTZCLAW. [SEAL.]
D. P. LUMPKIN. [SEAL.]

Attest: E. G. CAREW.
CHAS. T. BALLARD, JR.

STATE OF ALABAMA, }
Montgomery County. }

Before me, George Ely, judge of the probate court of the above county of Montgomery, the same being a court of record and having a seal within said county, on the day of the date hereof personally appeared Mrs. Mary B. Holtzclaw, wife of James T. Holtzclaw, parties of the preceding deed or interest bearing date the 18th day of June, 1869; and having been examined by me privately and apart from her said husband and having the same fully explained to her, she, the said Mary B. Holtzclaw, acknowledged the same to be her act and deed and declared that she had willingly signed, sealed, and delivered the same, and that she wished not to retract it; to certify which I hereunto sign my name and affix the seal of the

said probate court, of which I am *ex officio* clerk and keeper of its records and seal, this 30th day of July, 1869.

GEORGE ELY,
Judge Probate Court, Montgomery County, Alabama.

STATE OF ALABAMA, }
Montgomery County. }

I, George Ely, certify that I am judge of probate court of above county, which is a court of record, and that I am *ex officio* clerk and keeper of the records of said court; and I do further certify that the above attestation is in due form and by the proper officer and is entitled to full faith and credit.

Given under my hand and seal of office, at office, in the city of Montgomery, in the county of Montgomery, in the State of Alabama, on this 22d day of June, A. D. 1869.

[SEAL.] GEORGE ELY,
Judge Probate Court, Montgomery County, Alabama.

Filed Nov. 19th, 1869, at 3 p. m.
Recorded Nov. 23d, '69, at 8½ a. m.

WM. MULLER, *Clerk,*
Per JOHN H. YOUNG,
Deputy Clerk.

253 (50 cents for United States revenue stamp on original deed cancelled.)

THE STATE OF ALABAMA, }
Montgomery County. }

Know all men by these presents that whereas heretofore I did, on a sufficient condition, release to Dr. Robert J. Ware, now deceased, all reversionary interest that I then had in the estate of David White as the heir or legatee of Mary S. White and any direct interest that I had in the estate of Mary S. White, *and* now authorize Robert Y. Ware, executor of Robert J. Ware, to use my name in any manner that may be necessary to secure the right of David White's estate in and to any and all property whatever to which it has any claim or interest in the State of Texas or elsewhere without any cost or ultimate liability on me.

Given under my hand and seal this the 19th day of June, A. D. 1869.

THOS. W. COWLES. [SEAL.]

Attest: JOHN L. COBB.
JAMES Y. BROME.

STATE OF ALABAMA, }
Montgomery County. }

Before me, George Ely, judge of probate court of above county, which is a court of record, *ex officio* clerk and keeper of the records, who certifies that this attestation is in due form and by the proper officer and entitled to full faith or credit, personally appeared John

L. Cobb, who states on oath that the said Thomas W. Cowles, the grantor in the above conveyance, subscribed the same, and that the other witnesses — at the request of said grantor, Thos. W. Cowles.

Given under my hand and seal of office, at office, in [SEAL.] the city of Montgomery, in the county of Montgomery, in the State of Alabama, on this 21st day of June, A. D. 1869.

GEORGE ELY,
Judge Probate Court, Montgomery County.

Filed July 2d, 1889, at 10½ a. m.
Recorded July 3d, 1869, at 11 a. m.

WM. MULLER, *Clerk*,
Per JOHN H. YOUNG,
Deputy Clerk.

254 Filed Sept. 9, 1844, Galveston district court; Oct. 8, 1847, in Harris district court.

WM. B. LIPSCOMB (Administrator of Estate of David White, Dec'd), *vs.* M. B. MENARD and LEVI JONES. } Dismissed for want of Prosecution May 20, 1851.

Alleges that on December 13, 1836, Menard became indebted to White $50,000 for advances made in Mobile, Ala., for his use, benefit, and at his most urgent request, *in* and — secure payment of same made a mortgage, dated December 13, 1836, which is the same set up — pages 6 and 7 of the record, Galveston City Company *vs.* Scott, except that date of the printed copy is the 10th of December, whereas copy in petition here is the 13th date; that acknowledged is the 13th.

Alleges, record in Galveston county, April 23, 1837, that White, at much labor and expense, proceeded to bring the shares into market at Mobile, but in April, 1837, Menard revoked the power and about April 18, 1837, transferred same land to Levi Jones, which he could have resisted, as it was coupled with no interest, but it cast a cloud over his right and drove him to suspend sales.

While matters in regard to said league and labor of land were then placed in hands of Jones, who proceeded to carry out plans commenced by White, and has realized large sums from sale of stocks and lots, much more than sufficient to pay amount due said White, but leaving a large amount still due.

That about November 7, 1838, White and Menard settled everything referred to in said mortgage, except for advances as aforesaid, and White executed to Menard his acknowledgment thereof, and that Menard had paid on account of said advances $25,000 about November 7, 1838, $8,550 December 10, 1838, and $2,000 June 4, 1841, and the balance with seven per cent. per annum interest, the rate in the State of Alabama, where said advances were made, and to be repaid from December 13, 1836, as described in conveyance to Jones, made and accepted to defraud White by taking from him

the management of the fund out of which he was to be speedily remunerated.

In said conveyance White's claim is expressly recognized and admitted and Jones charged out of the sales as aforesaid with the settlement thereof, and Jones was expressly informed of White's rights and claims.

Jones is setting up claim in himself for others to the property in opposition to the claim of White, contrary to every principle of equity and justice.

Jones and all others, under name and style of Galveston City Company, becoming such as purchasers of scrip or shares in said stock, were expressly informed of White's claim, as in each scrip or certificate of stock the same is distinctly acknowledged and referred to.

Premises considered, large balance due White's estate, and Jones and Menard confederating to prevent White's acting under
255 said instrument and reimbursing himself makes both defendants; prays injunction against setting up claim to said premises and proceeds of sale until said debt is fully paid and settled.

Prays judgment for amount and foreclosure, etc.

B. GILLESPIE,
Solicitor for Petitioner.

Answer for Defendant Menard. Filed October 24, 1845.

1. General demurrer.
2. General denial.
3. Limitations.
4. Limitations of Alabama.
5. Limitations of Texas.

That at the time of executing the mortgage referred to in petition Menard had become indebted to the government of Texas in the sum of $50,000, to be paid in two and four months; consideration, the relinquishment of the claim of the government to a league and labor of land on the east end of Galveston island, previous title to which was claimed by Menard. Inducement to the government was to procure supplies for the army, then suffering in the field, and inducement to Menard for that he was a citizen, regarding the salvation of the country depended on keeping up the army; was endeavoring to make arrangements to procure the money when White, a stranger from the United States, offered to advance it if he was sufficiently well paid for it.

It was agreed that if Menard would secure the ultimate repayment of said $50,000 and give him in addition 10 per cent. on the whole amount of property in the Galveston league he would advance the $50,000, being secured by a mortgage on said league; and Menard executed said mortgage.

White, so far from advancing the money, required defendant's acceptable drafts on New Orleans and received same.

The league and labor had been divided into 1,000 shares, and it was agreed that White, to reimburse himself, might sell same at a sum not less than $1,000 a share. Instead of advancing the money and paying said amount, he proceeded to Mobile and thrust the stock into market at $500 a share, so as to raise the $50,000 instead of advancing it; and, finding White so faithless and that he had greatly injured the value of the property, Menard was compelled to convey to Jones to prevent the ruin of the interests of his associates in the property. White would not limit himself not to sell for less than $500; was determined to make the stock pay the $50,000 and his commissions without advancing a dollar himself. Avers that White has never paid the government the sum of $50,000, nor has he paid so much as he received from the sale of said stock. If
256 any settlement made with the government, it was made recently in depreciated currency of the Republic, bonds, promissory notes, etc., not worth more than five or ten cents on the dollar. White by his conduct put defendant to great expense and loss and depreciated the property $50,000, which is a valid claim against him, and subjected defendant to expense of sixteen shares of stock, worth $1,000 each, paid said Jones as commission on said trust; that White received from him November 7, 1838, fifty shares of stock, valued at $50,000, and worth, after depreciated by White, $25,000, which fifty shares was the balance of ninety shares claimed by White for advancing or claiming to advance the $50,000, he having previously received or retained forty shares in the distribution of stock; said forty shares worth at least $20,000. Said White never earned nor was entitled to said commission, but forfeited all claim thereto by misconduct and violation of agreement, and defendant claims return of said ninety shares of stock, or their value, or to have same applied to said mortgage and to cancel the same.

That said mortgage was founded in a corrupt intent to evade the usury laws. Said White claims said $50,000 and eight per cent. interest and ten per cent. commissions, making $90,000 for services never rendered or to be rendered, and called a commission to evade usury laws of Alabama; also usury laws of Texas; concealing interest under guise of commission.

Has fully paid said mortgage.

Jones has no interest, having transferred long before suit brought, and is improperly made party.

Denies that plaintiff is administrator of White.

Denies that probate court had jurisdiction to grant letters of administration.

Defendant and Jones had long correspondences with White, per which truth of this answer will appear. Many of the letters were with Lipscomb as White's agent.

Defendant calls for production of correspondence.

J. BUTLER,
Attorney-at-Law for Menard.

Answer for Jones by T. M. Joseph.

Venue changed from Galveston to Harris county.

Suit dismissed for want of prosecution May 20, 1851.
Copies of papers in the suit of—

257 WM. B. LIPSCOMB, Adm'r of David White, *versus* M. B. MENARD and LEVI JONES. | Brought in District Court of Galveston Co. Removed to the District Court of Harris County. No. 1733.

Received of Michael B. Menard eight thousand five hundred and fifty dollars, being in part of the fifty thousand dollars to be paid to the government of Texas for the league and labor of land on east end of Galveston, agreeable to my contract with the government and the said Michael B. Menard.

DAVID WHITE,
Per AB. LIPSCOMB,
Attorney-in-Fact.

Galveston, 28th December, 1839.

GALVESTON, TEXAS, *7th November*, 1838.

Received of Michael B. Menard fifty shares of Galveston stock in full for my commissions on the sale of the stock. I have also received from sale of stock made by me twenty-five thousand dollars, leaving a balance of twenty-five thousand due me from said Michael B. Menard. D-VID WHITE.

Witness:
THOS. F. McKINNEY.

David White, in account with Republic of Texas, Dr.

1840.		
Feb. 6.	To responsibility for M. B. Menard for purchase of a league and labor of land on Galveston island	$50,000
		$50,000

CR.

By amount paid on draft to G. and T. H. Borden	$5,023 80
By amount paid on draft to Gen. T. J. Green	26,948 68
By amount paid by order of secretary of state to F. Collett	1,176 50
By amount paid on draft to G. and T. H. Borden	2,313 75
By amount paid on draft to McKinney & Williams	8,550 00
	$44,012 73
	$5,987.27

REPUBLIC OF TEXAS, *Treasury Department*, } No. 6.

COLUMBIA, 16*th December*, 1836.

RESPECTED SIR: Yours, under this date, acknowledging the receipt of acceptances to your satisfaction as the agent of this
258 government in a certain contract made by this government with M. B. Menard, in which contract the said Menard be-

came responsible for the sum of fifty thousand dollars, thirty thousand of which is due and payable on the first day of February next, and the balance, say twenty thousand dollars, in sixty days thereafter. This intimation on your part is perfectly satisfactory to this department, and drafts will be made accordingly, of which you will be duly notified from this department as circumstances may require.

I am, very respectfully, your obedient servant,

HENRY SMITH,
Secretary of Treasury.

To David White, Esq., Texas agent, Mobile.

DECEMBER 14TH, 1836.

I, David White, agent of the government of Texas, appointed for the special purpose of receiving from M. B. Menard the sum of fifty thousand dollars in cash or approved acceptances in New Orleans or Mobile, certify that I have received to my satisfaction approved acceptances from said Menard in two drafts in the city of Mobile, the one, payable on the first day of February next, for the sum of thirty thousand dollars, and the other, payable two months thereafter, for the sum of twenty thousand dollars; all of which is given and received for and in consideration of the sum due the Republic of Texas for and on account of the sale made to said Menard by the said government of one league and labor of land situated on and including the east end of Galveston island.

(Signed) DAVID WHITE,
Agent Texas Government at Mobile.

TREASURY DEPARTMENT,
CITY OF HOUSTON, *April 21st*, 1838.

[SEAL.] I certify that the foregoing is a true copy of the original now on record in the archives of this department.

HENRY SMITH,
Secretary of Treasury.

I hereby certify that the above-named Henry Smith was at the date of the above-written instrument the secretary of the treasury of the Republic of Texas.

[SEAL.] Witness my hand and private seal out of my office, at Velasco, Texas, April 21st, 1838.

STEWART NEWELL,
United States Consul, Velasco.

259 David White, deceased, to the Republic of Texas, —.

For Menard's drafts for Galveston island, payable in Mobile	$50,000 00
Received for land scrip, 48,000 acres at 50c. per acre	24,000 00
May 31st, 1837	$74,000 00
	56,536 90
Balance due	$17,463 10

31—289

Cr.: Voucher No. 1, $5,023.80; voucher No. 2, $486.00; voucher No. 3, 389.67; voucher No. 4, $26,948.68; voucher No. 5, $7,779.00; voucher No. 6, $1,076.00, $500.00; voucher No. 7, $1,000.00; voucher No. 8, $2,313.75; voucher No. 9, $670.00; voucher No. 10, $1,800.00; voucher No. 11, $8,550.00—total, $56,536.90.

NOTE.—The deposition of James B. Miller, who was secretary of the treasury in May, 1844, proves that treasury notes were then worth five to ten cents on the dollar.

Following is a copy of a paper in the case:

I, B. Gillespie, attorney for the estate of D. White, make oath that the enclosed documents, marked Nos. 1, 2, 3, 4, 5, 6, Book G, are all the documents or papers in his hands in relation to the suit of said White's administrator against M. B. Menard, in Galveston, as called for in the notice given me, as he now believes, etc.

B. GILLESPIE.

Sworn to and subscribed before me—

S. R. ROBERTS,
Justice of the Peace, Washington County.

260 *Deposition of W. P. Ballinger.*

ASENATH A. WARE *et als.*, Complainants,
vs.
THE GALVESTON CITY CO., Defendant. } No. 155.

Judge Ballinger having written out and filed with the examiner his deposition under agreement that complainants should propound interrogatories in the nature of cross-examination after reading the deposition, the complainants propounded the following interrogatories thereunder:

First interrogatory. Do you, upon your reputation as a lawyer, consider the matter as set out in your deposition evidence?

ASENATH A. WARE *et als.*, Complainants,
vs.
THE GALVESTON CITY CO., Defendant.

Suit pending in the United States circuit court, eastern district of Texas, at Galveston, in equity.

Answers of W. P. Ballinger to the Cross-Interrogatories Propounded to Him by the Complainants in the Above Cause.

Answer to the first interrogatory. I consider the matters set out in my deposition to be properly and legally responsive to the statements made as evidence in the case of the deposition of the witness Thomas J. Molton taken by the complainants as evidence and on file in this cause.

Second interrogatory. You have made frequent reference to the law as you understand it to be expressed by the suit of Scott *vs.* The

Galveston City Company, 42 Tex., 535. Now, is not the following a copy of the syl-abus of that case as reported?

THE GALVESTON CITY COMPANY
vs.
THOS. J. SCOTT and Others.

1st. Galveston City stock.—The scheme of association inaugurated by David White in 1837 for the formation of a stock company for the sale of land on which the city of Galveston is built was never carried out by him so as to make those persons to whom he had issued stock partners under his certificates, in compliance with their terms, but it left those who held shares in the land by purchase from him for a valuable consideration associates with M. B. Menard as part owners of the land.

2d. Laches.—The holder of White stock who was debarred by the action of the Galveston City Co. from entering said company as a stockholder cannot, after a lapse of more than twenty years, maintain an action to enforce a recognition of his stock or for damages as against said company which had actual possession of the land belonging to said company from the date of its organization.

261 Answer to the second interrogatory. I presume the syl-abus of the case referred to has been correctly copied.

Third interrogatory. Is it not a fact that the instrument sued on in the Scott suit was never recognized by the Galveston City Co. as a share of its stock, and is it not a fact that the shares and certificates thereof owned by David White and for which this suit was brought are part of the current series of the regular and only stock the said company has ever and at all times recognized as representing its capital?

Answer to the third interrogatory. Both matters as stated are facts; but the contention of the plaintiffs in the Scott case—their main theory on which they claimed to recover, and pressed with every appearance of the sincerest conviction and reliance—was that the deed of trust under which the company was created and its stock issued made the White stock *ipso facto* stock of the company, equally with the trustee stock.

Fourth interrogatory. Is not James Love, who got sixteen of the shares sued for in this cause from A. S. Lipscomb, attorney-in-fact for David White, the same James Love, agent for Leslie Combs, and who is mentioned in Hodge *vs.* Combs, 1st Black, p. 192, and Combs *vs.* Hodge, 21st Howard, p. 397, and what year did said Love die—was it not some time between 1874 and 1879?

Answer to the fourth interrogatory. Although without personal knowledge as to the cases in the reports of the Supreme Court of the U. S. referred to, I have no doubt he is the same person. He died between the years referred to, and, to the best of my recollection, he died in the month of August, 187–.

Fifth interrogatory. Have you not said to J. R. Coryell, agent for the complainants, and to Molton and others that you believed your

old uncle (meaning James Love) got away with or made away with some of White's shares, or words to that effect? Have you ever said anything to that effect to any one?

Answer to the fifth interrogatory. I have no recollection of such conversation. The particular expression I am confident I never used. It has been my opinion that Col. James Love was indebted to Judge Lipscomb for Galveston City Company stock, growing out of transactions in stock between them in 184– and previously. The precise amount of such stock or indebtedness I did not have knowledge or opinion about. My opinion, or conjecture then, more properly, was, I have no doubt, expressed in 1869 in my earliest conversations with him, and I have no doubt expressed it to others. I do not think I ever did so to Mr. Coryell.

Sixth interrogatory. When you state that A. S. Lipscomb and David White were copartners, and that you knew it from the letter or memoranda of Lipscomb stating they had an interest together in fifty-six shares of the stock of the City Company, are you not stating your legal opinion, inference, or argument, and is not the
262 following the original of said memoranda and *is* not the annexed and following two documents, one signed Abner S. Lipscomb and the other bearing date Mobile, 4th December, 1838, and purporting to be a copy of the original in possession of Lipscomb, both in the handwriting of said Lipscomb?

Statement of the Account of Galveston Stock Belonging to the Estate of David White and Myself, etc.

Sixteen shares sold for lots in the city of Galveston and one-half league of lands on the waters of the Neches. Title to all in my own name.

Five shares sold for the 10th of John A. Wharton's head-right at Velasco. (Title not yet completed.)

Five shares sold for twenty shares of the stock of the league and labor at Edwards' point. (Certificates in my name.) The above was purchased on joint account between D. White and myself, and his estate is in realty owners of one-half, and the titles to that amount will be made as his representatives shall direct.

I received sixty-two shares of the stock, in fifty-six of which I was joint owner with Mr. White, leaving on hand for the estate of D. White twenty-one shares. I advanced five thousand dollars to aid Mr. White in the payment of the draft in favor of T. J. Green, which was to have been paid as soon as it could be collected from M. B. Menard. One thousand was paid in Mobile and two thousand paid in this country by M. B. Menard, for which he has my receipt, and is entitled to a credit.

ABNER S. LIPSCOMB.

Texas, January 8, 1844.

Abner S. Lipscomb is jointly interested with me in fifty-six shares of Galveston, out of which he has received five shares, subject to any defalcation, should there be any, M. B. Menard paying the full

amount of the fifty thousand dollars paid by me to the Texan government.

Mobile, 4th December, 1838.

(Signed) DAVID WHITE.

The original, of which this is a copy, is in my possession.

ABNER S. LIPSCOMB.

A. S. Lipscomb to David White.

Amount received			from Heard	500 00
Do.	do.	do.	Kenan	500 00
Do.	do.	do.	Innerarity	1,600 00
Do.	do.	do.	Tucker	200 00
Do.	do.	do.	Woodcock	100 00
				2,900 00

263 CR.

By note in bank	1,187 20
" cash	900 00
" paid Mr. White	500 00
" paid your note to Roberts	61 00
	2,648 20
" paid Green	5,000 00

Copy of an account in my hands.

ABNER S. LIPSCOMB.

Answer to the sixth interrogatory. I am, of course, without personal knowledge as to the relations or interest between White and Lipscomb as to the stock in the Galveston City Company. My belief as to their being interested jointly or as partners in the stock was based in part on the two documents referred to. But there was another statement made by Lipscomb and in his handwriting to Ware, I think, which alleged his joint ownership in all the White stock, referring to the records of the City Company for the entire number, stating the aggregate, I think uncertainly, but at a larger number than in fact ever actually stood in White's name. The document was among the papers in my possession at one time, and I am quite certain was delivered by me to Coryell, — I retained for a time to use in defense of the suits brought for interest in the White lots sold by the Wares. The language to which I refer was as follows: "In the Galveston City Company stock Mr. White and myself were jointly interested to the amount of seventy-five or eighty shares. I am not positive as to the exact number, but it can be ascertained at the office of the company in the city of Galveston. There were other facts which led me to the belief of a partnership interest between White and Lipscomb in the stock. Lipscomb's letters to White seemed to me so to assume. The manner in which the stock was acquired, Lipscomb's connection with White throughout, his coming to Texas and obtaining the stock, and his possession and control of

it all, and my opinion corroborated that view. The communications of Borden to Billingslea, part of complainants' evidence, tends to the same fact. The communication of Molton to the agent of the City Company in 1869 recognizes the joint interest between White and Lipscomb. This was, in fact, fully conceded and recognized on the part of Molton, and I never understood anything to the contrary, but the precise extent of the right *of* interest of each was not definite. In my early conversations with Judge Cole on the subject of the White stock he mentioned that it was Gail Borden's impression that Lipscomb and White were partners in the stock. I do not attempt to go over all the facts from which my belief on the subject has been derived; but the question assumes that it was derived solely from the papers specified, which is not the fact.

Seventh interrogatory. When you made examination of the trustee certificates issued to David White, as you state you did
264 in the suit brought by the Lipscomb estate, did you examine all the certificates of the shares for which David White's heirs sue for in this proceeding, and did that examination inform you fully as to all that you know which appears from said certificates and the endorsements thereon? And did not the defense of that suit require a careful examination of each and all of the trustee certificates evidencing the shares now sued for?

Answer to the seventh interrogatory. My recollection is that in the suit of Lipscomb's executrix and in the suit of Groce's administrator against the Galveston City Company I did examine each and every certificate of stock which originally issued to White or which ever issued to Lipscomb and was there in the company's office, a few shares of renewed stock to Lipscomb being, I think, still in the hands of his executrix at that time. The Lipscomb suit claimed that Judge Lipscomb himself and in conjunction with others owned a large number of shares of stock in the company which had never been transferred or disposed of by Lipscomb and in which his interest still continued, which shares would appear by the books of the company, but they were cancelled, and they could not be stated by plaintiff. The Groce suit claimed that Judge Lipscomb, being in possession and the owner of three certificates of shares of the company, gave and delivered them to Mrs. Groce, who, continuing to be the owner of them and in possession, lost them and had no means of identifying the particular shares, but that there would appear from the books of the company, and prayed recovery and decree for them. In company with Judge Cole I went over every share of the stock which had been issued to White and to Lipscomb, in order to show that all this stock had been surrendered or transferred by the act of Lipscomb himself or of White, and that neither Lipscomb's estate nor Mrs. Groce's estate was the owner of any such stock as was alleged in either of the suits. I am asked whether the defense of the Lipscomb suit required a careful examination of each and all the trustees' certificates evidencing the shares now herein sued for. I answer yes, so far as to show that they had been transferred by Lipscomb or by White. Neither of *of* those suits involved the ques-

tion of the validity or sufficiency of the transfers, as it might legally affect the interests of White, or under him. I am also asked if that examination informed me fully as to all that I now know which appears from said certificates and the indorsements thereon. I answer that the condition of all the certificates and the indorsements thereon was precisely then what it is now, to the best of my recollection and undoubting belief, and that I learned the same then. If the question inquires whether all my information in regard to the certificates was copied solely to what appeared on them, I answer no. Sources of information further and outside of the certificates have been remarked upon—the Scott case, papers of the James estate, those received from Molton, my conversations with Judge Cole or Judge Love, besides other witnesses and facts not necessary
265 to specify. I obtained the impression from Judge Love that the receipt given to Lipscomb covered stock previously received, as well as at the date that the date on the back of the trustees' certificates showed the date of their transfer, and that Love would have settled with Lipscomb but for the difficulties between Lipscomb and Ware.

Eighth interrogatory. The receipt of James Love to A. S. Lipscomb, in evidence, is as follows:

"I have received this day from A. S. Lipscomb thirty shares of Galveston City stock, which I promise to return whenever thereunto requested, value received. March 4th, 1842.

"JAMES LOVE."

Now, is it not the fact that sixteen of the certificates of shares complainants sue for were surrendered by James Love and new certificates issued to him and in his name in *time* thereof on March 4, 1842?

Answer to the eighth interrogatory. I refer to the evidence in the case as to the matter inquired of, having had no opportunity to do so.

Ninth interrogatory. When you answered for the defendant against the suit of Lipscomb's estate and when you told Molton that your opinion was that the claim of White's *b*eirs for the stock was bar-ed by limitation, had you seen the said receipt of James Love to A. S. Lipscomb for thirty shares to be returned on request and had you seen the following, which are evidence in this cause:

"For value received I do hereby assign unto James Love all my right, title, and interest in and to fourteen (14) shares of the stock of the city of Galveston, Texas, on which has been paid one thousand dollars on each share.

"A. S. LIPSCOMB.

"JOHN P. BORDEN, *Witness.*"

(Nos. 280 to 293.)

Answer to the ninth interrogatory. I had seen a copy of Love's receipt. I had not seen the transfer from Lipscomb to Love set out in interrogatory at my first interview with Molton, but had seen it

when I gave my final opinion to Molton, and also, I believe, when I answered in the Lipscomb suit, or certainly before its disposition.

Tenth interrogatory. And had you seen the following order in in Lipscomb's own handwriting and signed by him?

"WALNUT BLUFF, *9th January*, 1844.

"DEAR SIR: Please deliver to Dr. Rob't Ware, ex'r of David White, sixteen shares of Galveston City stock, and oblige your friend,

"A. S. LIPSCOMB.

"Col. James Love."

Answer to the tenth interrogatory. I had seen the original or a copy thereof; the original, I think, among Ware's papers. It was the document out of which, I understood, the entire suspicion and grounds — inquiry arose.

Eleventh interrogatory. Is it not a fact that the file or court papers in the suit of Mrs. Lipscomb, executrix, *vs.* The Galveston City Company have been lost or mislaid for years from the district clerk's office of Galveston county?

266 Answer to the eleventh interrogatory. I understand they are lost or mislaid, but do not know how long since.

Twelfth interrogatory. Did not James Love retain his intellectual vigor up to the time of his death, in 1879, and did you take his deposition or his evidence in any shape in suit of Lipscomb's Executrix *vs.* Galveston City Company?

Answer to the twelfth interrogatory. He retained his intellectual vigor to his death, which occurred, according to my best recollection, June 11, 1874. My recollection is that under the opinion on my part that claim would be set up that the receipt of Love to Lipscomb was the act of the City Company, Love was subpœnaed as a witness to show the contrary. He was sick and unable to attend the court, and my recollection is that he made a written statement, or signed one drawn by me, to the effect that all his transactions in stock with Judge Lipscomb or receipts of stock from him were his own individual and personal transactions and not for or in any manner representing the company. It was not sworn to, but the plaintiffs agreed that it might be read in evidence, but I do not remember whether it was read or whether the point was made by the other side. I never took his deposition or evidence otherwise; never thought of doing so. I have given my best recollection of the substance and effect of his statement.

Thirteenth interrogatory. Has the deposition of James Love been taken at any time by the Galveston City Company in any suit or without suit (to perpetuate his testimony)?

Answer to the thirteenth interrogatory. Not so far as I know or believe.

Fourteenth interrogatory. Is not the following letter of April 28, 1869, from T. J. Moulton to James P. Cole the rough draft of the letter sent by Molton to said Cole, and is not this rough draft of said letter in Molton's handwriting and partly in yours?

"GALVESTON, TEXAS, *April* 28, 1869.

"James P. Cole, Esq., ag't Galveston City Co.

"DEAR SIR: As the administrator *de bonis non cum testamento annexo* of David White, deceased, I respectfully request of your company certain information which is deemed of importance to the interests of the estate I represent; and, although I understand you do not permit the examination of your books and records, yet I hope that your rules will not stand in the way of your furnishing me this particular information.

"In 1839 and 1840, and subsequently, David White and Abner S. Lipscomb had certain joint interests in stock in the Galveston City Company, of which it is my belief that the estate of White never realized its proper equitable share or interest as against the estate of Lipscomb, and it is with a view to the ascertainment and assertion of those rights that I now seek information.

267 "My belief is that the renewed stock of the company which issued to A. S. Lipscomb was either proceeds of renewal of trustee stock which originally issued to D. White, and I request to know the date and number of all renewal stock which issued to A. S. Lipscomb, and, as far as your books show, upon what original or trustee stock the same or other consideration was issued. I wish also to show that all the David White trustee stock was in the hands of A. S. Lipscomb and was transferred by him, and will be obliged if you will inform me whether this is true, and if you will favor me with a copy of the indorsements or power and act for which this was done, as I presume the form in which one transfer was made is the form in which all were transferred.

"In a record in my possession showing the history of the David White stock, Book C, Nos. 1, 2, 3, 4, 5, 6, 8, 9, 11, 13, 26, 38, and 50 of original stock issued to David White appear to have been cancelled by D. White. My supposition is that they were in fact cancelled by Judge Lipscomb, and I request to know the manner in which they were cancelled.

"Yours very truly, THOS. J. MOLTON."

Answer to the fourteenth interrogatory. The draft referred to is in Molton's handwriting, except the parts in blue ink, which are in my handwriting, and I believe it to be the draft prepared by Molton and amended by me for a communication to be sent and delivered by Molton to the company, and which I believe was so sent and delivered at or near that date.

Fifteenth interrogatory. Are not the annexed twelve letters of May 28, '69; June 5, '69; Nov. 24, '69; March 4, '70; March 22, '70; April 26, '70; Oct. 5, '70; April 24, '71; May 24, '71; July 6, '72, and Dec. 5, '78, purporting to be from you or your law firm to T. J. Molton—are they not all in your handwriting and written by you?

MANN & BAKER,
M. C. McLEMORE,
S. W. JONES,
For Complainants.

Answer to the fifteenth interrogatory. They are, except the latter, April 24, 1871, which is in the handwriting of Col. T. M. Jack; but they are not all my letters to Molton, the dates of which are given in my original deposition.

W. P. BALLINGER.

Sworn to and subscribed before me by W. P. Ballinger Oct. 2, 1883.

C. DART,
Examiner in Equity.

JULY 24, 1883.

T. J. Molton having appended to his deposition a memoranda book, the contents of which is all in evidence, except a letter
268 from him of March 19, 1879, to the president and directors of the Galveston City Company—

To avoid cumbering the file and testimony with mere repetition, it is agreed that all said memorandum book, except the copy of said letter, be omitted.

MANN & BAKER,
For Complainants.
BALLINGER & MOTT,
For Defendant.

Exhibits to Answers of W. P. Ballinger to Complainants' Cross-Interrogatories. Filed with Examiner Oct. 2, 1883. *C. Dart, Examiner.*

NEW ORLEANS, *May* 28, 1869.

DEAR SIR: Your telegram and letters have been duly received and communicated to Mr. Ranger.

On receipt of the papers we will take pleasure in carrying the matter into effect.

I have not written to you, having been absent attending court at Houston, and also called here to meet Judge Swayne, of the U. S. circuit court, who had agreed to come to Texas to try an extremely important railroad case, but was not able to proceed to Texas, and directed the counsel to meet him here.

We shall probably agree to try the case in the North during the summer.

I have not yet taken the deposition of Judge Cole to unravel the matters of the City Company, not having been able to get ready to do so with the full effect I desire and intend.

My best consideration is given to the subject and it shall have early and certain attention.

Let me know if you get information about Mr. Lewis, of North Carolina. I have seen General Bates, but he didn't know him.

It seems quite important, as respects the lots here, to find out about that debt.

Very respectfully and truly yours,

W. P. BALLINGER.

GALVESTON, *June* 5, 1869.

Thomas J. Molton, Esq., Montgomery, Ala.

DEAR SIR: We received by express last evening the package of papers relating to the estates of David White, Mary S. White, and Rob't J. Ware, together with the deed of Mrs. Ware and Rob't Y. Ware, executor to G. Ranger, and other papers relating to the validity of said conveyance.

We acknowledge, also, your communication accompanying same, which has had our careful attention. Our district court is in session and we have not been able, for the morning's mail, to make the examination and write you as fully as we would be glad to do,
but we think best to write you at once and the papers shall
269 have our further consideration, with any additional suggestions we may be able to make the ensuing mail. We regret extremely to say that we do not consider the title in its present condition one which we could conscientiously advise Mr. Ranger to accept. We have not deemed it best to see him, knowing that he would not undertake to have any opinion on the subject for himself, but would require our approval of the title; and, being sincerely desirous of promoting your views as well as his own and consummating the sale, we have thought it best to communicate our suggestions directly to you.

The title being in David White, he devised the *vendue* of his estate, which included his interest in Texas lands, to his wife, Mary S. White, Asenath Ware, David P. Lumpkin, and Mary A. Cowles, providing that if the latter two died without heirs of their bodies the interest of each shall go equally to Mary J. White, Asenath Ware, Daniel White, and Clement White. It seems best to remark at this point that as the validity of a will, as it relates to lands in this State, must be tested by the laws of Texas, there is much doubt, under our law, as to the validity of this condition, and whether the title in David P. Lumpkin and Mary A. Cowles is not absolute. However, as there should not be any legal question where the question of fact avoids it, you should ascertain and inform us precisely as to the condition of these parties, Lumpkin and M. A. C., now Mrs. Holtzclaw, as to offspring. Are they married, and what are the probabilities of death without issue?

By the will of Mrs. Mary S. White the one-half of her interest in lands on Galveston island was devised to David P. Lumpkin, and by a codicil they were to be held by Clement White or his trustee; the other half she devised to Thos. W. and Mary Ann Cowles.

As to the right of D. P. Lumpkin, its conveyance to Robert J. Ware in the estates both of David White and Mary S. White seems clear and full, but the conveyance shall be proved for record in Texas in accordance with the form you took from here, which we will again hand you herewith, as a purchaser would require that his title papers should be of record in this State, and that he should not be compelled to go to Alabama after them.

The right of Thomas W. Cowles seems to have been conveyed to Rob't J. Ware also, but this is not evidence in any legal, sufficient

manner. It is most probable that Mr. Ranger would be satisfied that this conveyance was made, and could yet be produced and recorded, though the want of it would make the title unmarketable and be a blemish preventing fair sale of a property made more valuable by costly improvements, and you would be expected to remedy it.

The interest of Mary A. Cowles (Mrs. Holtzclaw) presents a substantial difficulty. By the will of David White she is devisee of
270 one-fourth, and by the will of Mrs. Mary S. White one-fourth of her fourth. These interests both, we think, still remain in her. The instrument between her and her husband and Robert J. Ware and wife recites a certain controversy about the estate of David White, in which she had sued R. J. Ware; also claims of his on account of said estate, etc., etc., and then she thereby relinquishes and discharges the said Ware from all liability to her in the estate of David White or on account thereof, and dismiss- the said suit. This cannot be construed to be a sale or transfer on her part of her interest in the property of the estate of David White in Texas. R. J. Ware had nothing to do with that, no power over it, reliability in regard to it; and this settlement, we think, does not embrace her interest in the Texas estate of David White. As to the estate of Mary S. White, the agreement is to sell it out, pay certain debts, and divide the residue equally between her and R. J. W.; and the probate proceedings show that the estate was sold, debts paid, and $2,300 paid to each of them. If there be a further residue in the estate of Mrs. White in or from the property in Texas, this agreement would extend to it, or, at all events, she has not relinquished her right to it under the will.

We repeat that Mrs. Holtzclaw seems to have her rights in the Texas property both as devisee of David White and Mary S. White. We are not unmindful of the ground maintained by you that R. J. Ware was a creditor for large amount of the estate of David White; that the Texas property, coming from his estate, is first liable to pay this debt, and therefore she would have no interest in it. This may or may not be so, as a result to be worked out by legal proceedings.

But it is too remote and too doubtful to make a title to city property dependent on it safe and marketable. By our law the interest in real estate vests immediately in the heir or devisee, but is subject to be divested by administration and to be sold for payment of debts; but this must be done in due course of law. If delayed until the liability for debt was barred, the property would not be affected or touched for debt in the hands of the heir or devisee.

Limitation to a note in Texas is four years; to a judgment is ten years. Ten years is our longest period of limitation, barring trusts, not recognized.

In order to hold this property standing in the name of David White and vesting by operation of law in his heirs or devisees liable to a claim of any kind, administration must be opened here, the debt presented to the administrator and either acknowledged or established by suit, and the property sold to satisfy it. This is a pro-

ceeding which will take some time and expense, and whether an administrator of David White could now legally acknowledge debts which accrued back prior to 1850 is by no means certain. It is true
271 that by our present laws limitation does not run in favor of a person until a year after he comes into the State, although the courts decided differently up to about 1852, and might hold all debts against D. W.'s estate barred under the former law. But although limitation strictly does not run in favor of a non-resident, yet, as I have said, ten years is the longest period of limitation with us. The courts are disposed to pronounce demands *state* which arose and have not been acknowledged, but permitted to slumber longer than that. R. J. Ware was guilty of laches, if he had any claim against the estate of David White to be pursued against the property in Texas, in not pursuing it many years ago. If there was a balance due him at his partial settlement — 184–, for which he looked to property in Texas, why not, then, take legal steps to enforce it?

We are not asserting this as law or as the result of our own judgment, but presenting questions that are real, substantial, practical, and of a -haracter which, we repeat, *that* as honest lawyers we would be bound to tell a client stood seriously and dangerously in the way of a good and clear title. As to the effect of the written agreement between Ware and Mrs. Holtzclaw, it is our impression that the argument is quite as strong and stronger; that it settled any liability by Mrs. H. to Ware's claims against the estate of David White; that it released to Ware her interest in Texas lands belonging to his estate, but our impression is that it could not be construed to have this effect either way except as to Mrs. White's estate. Certainly by that agreement Mrs. H. is either left to her interest, as devised in the will of her grandmother, in the Texas *rendue*, or, more probably, would take a half.

Again, we do not find such a grant of power in the will of Robert J. Ware as would authorize his summary executor in Alabama to make a private sale to lands of his estate in Texas. We think a will might contain such a grant, and in the probate of a will or certificate of its probate there, which amounts to probate here under our law, if the power was express and clear in its application to Texas lands, an executor might make a title. But the general power contained in this will, without any express reference to lands lying abroad, being joint to two executors, one of whom has since died, would not, in our opinion, pass such a title as would be clear and unquestionable against the heirs-at-law of R. J. Ware.

Did James Ware (the deceased son) leave a will, and what are its provisions? We understand he left a family.

On the whole, although we do so with sincere regret, our conclusion is that the title you offer is not a good one or one which Mr. Ranger could with propriety and safety accept.

If D. P. Lumpkin is a man of family, with children, and no probability of his death without heirs of his body, and the same is true of Mrs. Holtzclaw, and you can get a release or conveyance from Mrs. H. and her husband to all the Galveston property in which

the estates of D. W. and M. S. W. have any interest, or to
272 those lots, and can supply the conveyance from Thos. W. Cowles, then I think that a deed from Mrs. Ware, Rob't Y. Ware, as executor and in his own right, and from yourself and wife to Mr. Ranger, of general warranty, and expressly binding yourself for assurance of the title of the heirs of James Ware, would be accepted by Mr. Ranger.

I do not see, though, how the interest of the heirs of James Ware can be disposed of safely and clearly, except by administration and sale thereof in Texas, unless his will confers very clear powers on the subject.

Can you not get from Mrs. Holtzclaw and her husband such a conveyance, and, with the chances of recovery from the City Company, is it not best now to make the effort and to get it, and to pay something for it? That seems to us the cheapest and best way for you to proceed, especially if it be her understanding that her interest has been heretofore transferred to R. J. W.

Is it not better now to pay her than to have to litigate with her with the prospects of her maintaining her interest in both estates? We do not presume to advise, and if a purchase can be made on reasonable terms it strikes us as the best plan to quiet the title.

If the conveyance from Thos. W. Cowles cannot be found is it not practicable and best also to get him to execute another relinquishment? Even if — to pay a little for this, it is better to do it than to have to bring a suit, and you cannot reasonably expect to sell valuable city property on which men calculate on putting improvements five or six times the value of the property, where there is a patent blemish on the title which it would take a lawsuit to cure.

If these parties are poor and would wrongfully extort now from their own relatives rather than clear up your title, this renders it certain that as soon as a fine building goes up on the premises their claim comes forward and would have to be bought out or defended. The cheapest and best plan in our judgment is for you to clear up your title now by obtaining releases from those parties.

Should you be unable to effect this, we see but one alternative, and that is to instruct Mr. Trueheart to open administration on the estates of David White, Mary S. White, Rob't J. Ware, and James Ware in Texas forthwith, and have those matters all settled in the most expeditious manner; but this, we presume, will lead to the bringing forward of the claims of the different parties—the present sale cannot be concluded and must be abandoned—but still it is a difficulty which will always confront you, and it is best to make the earliest disposition of it.

We will report to Mr. Ranger that we have received your papers, but have made further suggestions to you, hoping they may be complied with on your part, and will await further communication from you, which we will expect as promptly as possible.

We have endeavored to go over the whole case pretty
273 fully, not having concluded this until just in time for the mail this Sunday morning, reviewing the papers again last night.

We have not been able at this term of the court to make the arrangements for trial with Mr. McLemore, and to compel the disclosures by deposition from the City Company, which we intend doing. The case is of very great importance and delicacy and requires the best handling. We will not delay it, but cannot be precipitate. With our best regards,

Very truly yours, BALLINGER, JACK & MOTT.

GALVESTON, *July* 12, 1869.

Thos. J. Molton, Esq., Montgomery, Alabama.

DEAR SIR: We wrote you remitting purchase-money for lots from Ranger, less Mr. Trueheart's charges which you instructed us to pay; hope it reached you safely and is satisfactory.

We now return to you the deed from Mrs. Ware, Rob't Y. Ware, your wife, and yourself; also the deed containing the signature of Mrs. Holtzclaw, in order that Mrs. Molton and Mrs. Holtzclaw, being married women, may make the acknowledgement which conforms to our statute, were proof of their signatures before witnesses not being a compliance with the statute. Mr. Ranger has had the deeds recorded, but will have record made again after proper acknowledgement. We hand you herewith certificate to which the acknowledgement of Mrs. M. and Mrs. H. must conform before the same officer, judge of the county court. Please have these acknowledgements and certificates made at once and return to us.

The deed of Rob't Y. Ware, as administrator of his brother, as we wrote you, is without legal effect. As administrator in Alabama he has no such power of conveyance. The interest of the heirs of James H. Ware ought to be diverted by proper legal proceedings. This will be by administration here in Texas on the estate of Jas. H. Ware. You should give directions to Mr. Trueheart at once to have administration on the estate of James H. Ware, obtain sale of all his interest in Texas lands, and let it be bought in in the name of Rob't Y. Ware. This will cure the defect in this title and will simplify all your further proceedings. It will possibly be our advice to cause this administration on David White's and Mrs. White's estate preparatory to suit in the matter of Galveston City Company stock, but we have not yet completed our examination and arrived at conclusions in those matters. Our courts have been continuously in session; the Federal court is now setting, and the time of the writer has been engrossed in court.

The district court adjourned last week, not having tried one-fourth of its docket. The case of David White's heirs respecting the lots *were* not reached. Our impression is that it is only by means of testimony of the agent of the Galveston City Company in that case that we can obtain the information from the records of
that company necessary to understand your rights.
274 You may rely implicitly that we shall not neglect this. We
must get at it in our own way; but the new constitution, which will no doubt be adopted, prevents limitation from running since the war, and the delay necessary to our investigation will certainly not prejudice you.

Yours very truly, BALLINGER, JACK & MOTT.

GALVESTON, *November* 24, 1869.

Thos. J. Molton, Esq., Montgomery, Alabama.

DEAR SIR: Our Mr. Ballinger, who acknowledges receipt of your favor of 10th inst., was absent when it reached us. It now has his careful attention.

We supposed from our letters, and especially from interviews with you when in this city, two points were understood:

1st. That the Galveston City Company refused us information necessary to the understanding of the rights of David White's estate, and the only mode to obtain this was by the examination of the agent of the City Company, to be made in the suit now pending between White's heirs and others.

2d. That as to the plea of limitation as between White's heirs and the Galveston City Company the constitution now offered for acceptance by the people stopped the running of the statute from the commencement of the war to the time the constitution itself took effect; therefore, as respects any point of limitation, we had better wait until after the acceptance of the constitution than to sue now.

As to the first, no court has occurred since we last wrote you, and we have not been able to obtain the discovery from the agent of the City Company.

As to the second, there is every probability of the adoption of the new constitution by vote of the people, but whether it will be accepted by Congress is a point wholly conjectural. Our own impression is that "reconstruction" will be effected under the constitution now submitted to the vote of the people.

We have not yet been able to obtain the information we deem necessary.

Our Mr. B. went to Washington in August to attend to the case of the Galveston, Houston & Henderson railroad case and was absent all summer. The records of the City Company are sealed to us unless we break the seals in some legal manner. We believe we have the means of doing this, and that the delay until the adoption of the new constitution will be advantageous instead of injurious.

We appreciate fully the importance of the case. If you and those having similar intere-ts have rights, they are extremely important and valuable, such as we should be most happy to be the means of enforcing.

If we are relied upon to investigate and advise you as to
275 your interests, we hope you will extend the confidence that we will not neglect your interests, but will proceed with all the diligence practicable and advise you with a true candor, and, in the meantime, that no damage can occur to your interests.

Absence of our Mr. B. has prevented us from having administration necessary to perfect title of Ranger.

Mr. Trueheart is ready to act, and other matters shall have early attention.

Yours very respectfully,

BALLINGER, JACK & MOTT,
Per BALLINGER.

GALVESTON, *April* 26, 1870.

Thos. J. Molton, Esq., Montgomery, Ala.

DEAR SIR: We are in reseipt of yours of the 14th, and note contents fully. The power of attorney from Mrs. Ware is very full and covers the purposes for which it can be useful.

We expected during this week to obtain the grant of letters on R. J. Ware's estate, for which petition has been filed some time, but, as we wrote you, by our new constitution our former office of probate judge is abolished, and all probate jurisdiction is hereafter vested in the district court, the clerk of which is to exercise such powers as may be prescribed by law. We did not expect the functions of the probate judges, however, to be suspended until the legislature passed laws defining the powers of the judge and clerk, respectively; but the general commanding has within a few days past issued an order terminating the functions, among other officers, of the probate judges.

We are all in much perplexity what to do about probate matters, different opinions being entertained by the lawyers. Some think the probate judge ought to continue to act; others that the district clerk can now grant orders, while others, and we are rather among the last, consider that neither the judge -or clerk can lawfully act, and that legislation must be awaited. The legislature, however, meets to-day, and no doubt among their first acts will be to provide for the case. We shall move as rapidly as possible in the administration of R. J. Ware's estate, but the transient condition of affairs may unavoidably involve more delay than otherwise would be requisite to obtain administration, sales, etc.

You inquire when our new supreme court will be organized and hold their term. This we cannot answer, as it depends on legislation. No doubt appointments will be made very soon after the meeting of the legislature, now within a few days, but we cannot conjecture when they will fix the term of court to commence. They will very probably be put to work promptly. As to limitation upon our suit against the Galveston City Company, I thought it might be best to sue in behalf of the services of White, and that limitation would very probably be saved both as to Mrs. Ware
276 and to Mrs. Holtzclaw. If suit was brought in the name of the latter, it would, of course, enure to the benefit of Ware's estate. Stock of the Galveston City Company is lower than when you were here; worth now about $9,000.

We do not see that you can do anything further to promote progress in these matters. We will give them our best attention, and there shall be no delay beyond what is unavoidable in the situation of our courts, and in the investigation, and last proceeding are

matters already so long neglected as to require the utmost precautions. Will write you as soon as the legislature acts.

One of our friends just mentions that the probate judge declines to attempt to act in probate matters. We think it clear that the district clerk cannot.

Yours truly, BALLINGER, JACK & MOTT.

GALVESTON, *March* 4, 1870.

Thos. J. Molton, Esq., Montgomery, Ala.

DEAR SIR: We are in receipt of your letter, and Mr. Trueheart has also handed us your letter to him, both of which have had our careful reading.

We must say that we have very great doubts of the legality of an administration on the estate of David White in Texas at this date. This subject was discussed fully between us when you were in Texas and we explained to you the aspects of the case. It was our conclusion then that the title to the Galveston property did not require administration on the estates of David White or his wife, but could be made by the devisees and heirs or claimants under them.

Under our laws title rests in heirs on the death of the ancestor, subject to be divested by administration; but we have short periods of limitation. Notes and mortgages are barred in four years, judgments in ten; and until 1852 it was decided that our limitation applied to claims against non-residents prior to their emigration to Texas. Thus in the case of Snoddy *vs.* Cage, 5 Texas R., 106, Cage owed a note four years in Alabama to Snoddy, where both of them lived. Cage came to Texas and in a few months Snoddy sued him. Limitation had not barred the claim in Alabama and Cage was only a few months in Texas, but the supreme court held the claim barred by limitation. The legislature in 1852 amended the law and required a residence of one year in the State before our limitation could be pleaded.

We think that our courts would hold, most probably, that title to Texas property has vested in the heirs and devisees of D. W., according to the will; that administration and proceedings by creditors have been postponed so long they are now barred by limitation in this forum. What would be the object of administration? Could any creditor of David White present his claim to the administrator who might be appointed here now, and could the administrator allow it for payment? This is extremely doubtful. What
277 was your idea about that? Would creditors present their claims against David White's estate, and the property then be sold to pay the creditors? Who are the creditors, and in what shape are their claims?

Unless a sale should be ordered to pay creditors the next course would be to partition the estate among the heirs. Actual partition would have to be made of each tract of land unless reported by commissioners as impracticable. A sale could only be made for purposes of partition, actual partition being impracticable. We do not think the probate court has jurisdiction to sell prop-

erty simply for the object of disposing of it and dividing the proceeds.

You should look accurately to the consequences of administration, if held legal, and the rights of parties to result therefrom.

Would the administrator, for example, claim title to the property sold to Ranger?

If debts were presented and allowed, why could not that property, as well as any other, be subject to be brought into administration?

The only practical object we see in administration on D. W. estate would be to claim that the property is liable to debts. Our impression of your statements is that Rob't Ware had paid all the debts, and that his estate is now the only creditor. If this be so, and that debt be in a shape it could now be enforced against the property here, you would have a practical object to subserve in administration.

Where the principal administration is in another State, has been kept open and acknowledged, recognized debts against the estate exist there and the estate abroad is insolvent and no administration has been opened in Texas, there would seem to be strong ground for sustaining an administration in order to enforce the rights of creditors, especially where the heirs have not claimed the Texas property or reduced it to possession, but it has been looked after and controlled actually by the executor in Alabama. We suppose this to be the case as to D. W.'s property in Texas; that it has been looked after and controlled mainly by the executor and administrator of his estate in Alabama and not by the heirs and devisees.

Unless the estate is in condition that the property of David White can be made liable in Texas to the debt to Ware's estate, and that is the only or main debt owing, we see no policy or jurisdiction for an administration. Title, having long vested in the heirs or devisees, could not be divested and subjected to administration, and the jurisdiction of the probate court being special and dependent on administration, it could not even effect a partition among parties of full age whose rights were already vested, and as a mere original proceeding.

Our district court would, however, have jurisdiction, without the necessity of administration and without incurring the costs of administration, to decree a partition among the parties entitled under the will of David White.

But unless there should be a voluntary appearance of the
278 parties publication would have to be made under our laws in order to make service of suit upon them.

After you inform us the exact condition of the estate of D. W. in Alabama and the position in which the debts against the estate now exist we can better decide whether the property here can be made responsible to the debts through administration, though we repeat that we have a very strong impression that the lapse of time has been so great that under our law limitation or laches will be held to bar the enforcement of the debts.

If that be the conclusion, then, instead of administering, our district court would have jurisdiction to make partition between the parties in interest, if practicable, and if not practicable to decree a sale and division of the proceeds.

There is another view of the matter. By our new constitution our probate courts are abolished, and the jurisdiction they have heretofore exercised is now vested in the district courts, the clerks of which have also certain probate functions. As our governor, U. S. Senators, Congressmen, and all are extremely radical, no doubt is entertained that within a few weeks at furthest our new constitution will be accepted by Congress and in full force, so that, practically, even if administration is opened, it must be carried through in the district court. As the latter court is to act, it would seem best to seek partition under its general jurisdiction and powers rather than under administration, which is liable to so much question.

If suit is brought against the Galveston City Company for the recovery of the stock we shall most probably prefer suing in the Federal court, and the existence of administration might prevent this; at least we felt that it was best not to attempt any administration on the estate of D. W. in Texas until that matter is determined and we could see our way clearly as to the best shape in which to present your rights.

On the best consideration we can give to the subject, our advice is, if you wish to make sale of the lands in Texas belonging to the estate of David White and Mrs. Mary S. White by legal proceedings, bring a suit in the district court of Galveston county in favor of Mrs. Ware, your wife, and yourself and Robert Y. Ware, making defendants of Trueheart, as administrator of James Ware and also of Dan'l O. and Clement White, setting forth the lands and property, the purchase by Rob't J. Ware of the interest of Lumpkin, Mary A. Cowles, Mrs. Holtclaw, and also of Thos. Cowles. If you could get their signatures to the enclosed paper, jointly or separately, it would be best to make them parties also, so that the proceedings might bind and the decree be complete in itself, without any reference outside to their conveyances, showing that the interest of all parties whatsoever were bound by the decree. We think it quite desirable to you to effect this, and that you should use
279 the best address in your power to effect it. If there should be a large recovery from the Galveston City Company on account of stock you would very possibly have to apprehend from Lumpkin and the others some controversy in which they would seek to maintain that their sale of their interest in the estates of David and Mary S. White was not intended to extend to the estate in Texas, but to the estate of which your R. J. Ware was executor.

The only adverse claimants really to you are Dan'l O. and Clement C. White, and their interest is only in Mrs. White's property outside of Galveston.

I think Mr. R. G. Street, of this city, is their attorney. If he or any other attorney will appear for them without the expense and

delay of publication necessary under our statute to cite non-residents, it will be quite a saving as respects costs and will enable us to obtain a decree of sale at the next term of the district court, which sits in May.

You can, if you please, correspond with them and state your purpose to bring a suit for the division or sale of the property in Texas in which you are jointly interested and request them to authorize their attorney at Galveston to appear for and represent them, referring them to us as your attorney.

We think, in this suit, quite as well as in the probate court, you and the parties interested in the estate of R. J. Ware can set up all the rights he is entitled to as creditor against the estate of David White. You can claim, first, to subject these lands to sale in payment of this balance; second, to make partition, either in kind or by sale.

We have put before you very fully our view of the diffieulties of the enforcement of the debt due R. J. Ware. The exact question may be said to be unsettled by our supreme court, which for years went to a great extreme in sustaining limitation, but latterly has been more guarded. Our letters to you last summer touched quite fully on the same subject.

If there be no parties adverse to you except Daniel and Clement White, with their small interest in the country lands, it may be doubtful whether you should impede or embarrass the case by insisting on that claim. We can at all events set it up, and, as it would absorb everything, would make it useful in promoting early and favorable agreement with them.

By ourselves seeing Mr. Street, if you prefer not to correspond with them, we may get him to appear for them.

If there is an appearance for all parties the sale can be decreed in June and can take place soon thereafter. You can attend in person or be represented by an agent or attorney, who can act for you in all respects.

The fact that lands may be in litigation is no obstruction
280 under our law to their sale. We have no champerty or maintenance under our law.

The decree of the court would fix the place of sale and could direct lands in the interior all to be sold here, though without express direction they would be sold in the county where situated.

The claim of the stock of the Galveston City Company might be ordered to be sold, but we would not recommend this. It belongs, we take it, to Mrs. Ware and her family, and the other heirs or devisees are not interested in it. A sale, therefore, is not necessary and we do not see its utility. Heirs-at-law are much greater favorites of court than speculative purchasers.

At our last district court your case with Lipscomb and others was not reached, and it was known that it would not be. We have had full conference with McLemore. He promises to examine the papers we present him, and if satisfied Lipscomb's estate ought not to claim an interest in these lots says he will not do it.

In full time before the next term of court we think we will be

able to adjust this matter practically with McLemore, but at the same time we want to use the suit for the purpose of obtaining discovery, as already explained, of the character of transfers or of authority under which Lipscomb surrendered the share of the stock to the company.

There is a suit now pending before our supreme court against the Galveston City Company, which we mentioned to you when you were in Texas, which we think will go a long way towards settling the question of limitation, which, provided the transfers were improper, will be the main question of difficulty in your case.

It claims of the City Company the reissue of a share of stock improperly issued to other parties at a very early day.

The district court decided in favor of the plaintiffs. Appeal was taken to the supreme court. Mr. Wm. G. Hale and ourselves are the counsel of the City Company, and have, of course, presented the questions in their favor with our utmost ability.

The two cases are not similar, but the decision in this may settle principles which will have a strong bearing in your case. A decision is looked for the present term of the supreme court, now in session.

We have filed application for appointment of Mr. Trueheart as administrator of the estate of James Ware, deceased. If we file the suit herein recommended he will be made a party defendant, and the interest he represents can be sold in that proceeding.

We believe we have explained everything connected with the interests to which you are related.

By our new constitution, as we before stated and wrote to you, all limitation from the date of the war to the adoption of the constitution is prevented from running, so that in any case involving a question of limitation we should postpone suit until its adoption.

281 During our present supreme court we had an important case, in which the main point against us was limitation since the close of the war, and we continued the case at this term to have the benefit of the constitutional provision. How far it will be operative, provided limitation was already complete, is, of course, doubtful; but our radical courts are very likely to uphold our radical constitution; and, at all events, we want the benefit of the doubt.

We have been in that disorganized state as to our courts and transition state as to our laws that progress could not be made any more expeditiously in the matters with which you are connected. It would, of course, have been quite easy to open administration on the estate of David and Mary White and go through the forms of a sale of property, but our best judgment is adverse to the validity of such an administration, and that it would involve the elements of a future lawsuit when lands become more valuable, and such an administration, not claiming the City Company stock, might be used to your prejudice if claimed and inventoried at anything like the value of such stock. It would give the estate a nominal value, defeating your objects and, perhaps, disabling Mr. Trueheart from giving bond.

The subject is complicated and not free from difficulties. We have gone over it very fully, especially in conjunction with our former letters.

As to the Galveston lots, we think your title already good, with the exception alone of the interest of J. H. Ware's estate, to be made good by Trueheart's administration.

Under the new régime we hope for a decided improvement in our judiciary system. The courts are to sit three times a year instead of twice, and the judges will feel that they are judges and not military appointees, distrustful of the rightfulness of their functions and shirking responsibility all in their power, except in cases of a political complexion.

We have been dilatory in writing to you, the undertaking being quite a task, and are concluding this some time after its commencement.

Will be glad to hear from you and to be able to assist in your views.

With best wishes, very truly yours,

BALLINGER, JACK & MOTT.

GALVESTON, *March* 22, 1870.

T. J. Molton, Esq.

DEAR SIR: We had an interview several days ago with Judge Chilton, from your city, in relation to the property in which your wife and her family are interested, and the situation of which we explained to him fully, together with the provisions of our law regulating descent of property, and the present condition of our probate court, which is merged into the district court under the new constitution. We understood him to accede to our views, or, at least, not to dissent, that administration on David White's estate would now be useless, if not void. As to the debt from
282 White's estate to Ware, he says so great a lapse of time has passed in Alabama that probably presumption of payment might there be indulged, or at least, as R. J. Ware bought the interest of the other devisee in the estate, you have no policy in attempting to sell out property which already belongs to you to pay a debt due to you. Mr. Trueheart exhibited to us your letter to him directing sale of the Galveston property. We advised you that, as to the Galveston property, except that part involved with Lipscomb, you could make title, with the single exception of the interest of J. H. Ware's estate. In the sale to Ranger we have already passed upon the title and approved your title, with that exception, to be made good by the administration here. Mrs. Ware, Mrs. Molton, joined by yourself, and Rob't Y. Ware, personally and as executor of his father's estate, can unite in a power of attorney to Trueheart or any other attorney you may select, authorizing conveyance of the lots, specifying them and generally all Texas lands.

A power executed by your wife should be acknowledged like a deed by a married woman, form of which we sent you to rectify deed of Mrs. Molton last summer.

This power should authorize him expressly and specially to con-

vey with general warranty and to warrant against all persons claiming under David White or his wife, Mary S. White, or under Robert J. Ware. The purchaser could thus receive his deed at once, without delay, and we repeat that we would pronounce the title clear, with the exceptions indicated, to be perfected through the *the* administration now opened by Trueheart.

As to *to* the property situated outside of Galveston, you could either sell such interest as you are able to convey or, if desired to bind the entire interest under David White, the decree of court, as set forth in our last, would be necessary and would be the plan of proceeding.

The supreme court have not yet made a decision in the Galveston City Company case, about which we wrote you. It is understood that the judges were divided in opinion.

Yours very truly, BALLINGER, JACK & MOTT.

GALVESTON, *April* 7, 1870.

Thos. J. Molton, Esq., Montgomery, Alabama.

DEAR SIR: We have your two letters of recent date and have given them careful attention. Indisposition of our Mr. B. for several days past has delayed reply. We were not aware of the fact that James Ware died before his father, nor that proceeds were needed for payment of the debts of R. J. Ware's estate. Those facts put a new aspect upon the case. We supposed James Ware's death subsequent to his father's, and that the object of sale was reali-
283 zation upon the property by each heir of his or her interest, and that all parties were of age and competent to dispose of their interest, except the heirs of James Ware, and that a lawful sale of his interest in the property under an administration on his estate was only requisite to perfection of title.

The law of Alabama regulating descent of estates has no application whatever to descents of real estate in Texas. The law here governs entirely. By our law the title to all the property of the deceased is cast by law on his heirs, but subject to administration for payment of debts and for legal distribution of their respective rights.

We think it perfectly competent to appoint administration in Texas on James Ware's estate, provided he had any, and upon the statement that his estate in Alabama was indebted and needed funds to pay debts and preferred raising funds out of lands in Texas to sale of property in Alabama the court here could order sale.

But as soon as we understood that he died prior to his father and that his father's estate was unsettled we were satisfied that the proper administration to open in Texas was upon the estate of Rob't J. Ware and not the son.

We, therefore, declined proceeding further with the application on the estate of James Ware, and have filed petition for Mr. Trueheart for letters, with the will annexed, on the estate of Rob't J. Ware. As soon as administration is granted, which will be next probate court, we can apply for an order of sale of the Galveston lots, and we hope by them to have the matter settled wiih Lipscomb,

so that those lots may be included. As to the Ranger lots, we see no difficulty in stating the facts respecting them as they exist, namely, that they have been sold and conveyed by the executor and heirs of Ware for the purpose of raising funds for his estate, except a certain interest which still remained in the estate; sell that and let it be bid in either by Ranger or Rob't Ware or conveyed to Ranger to perfect his title.

Under administration on R. J. Ware's estate a good sale and title can be made of the Galveston property. We have spoken to Mr. Street and he will correspond with the Whites and get authority to represent them in a division or sale of the interior lands, either amicably or by suit. In this manner we hope all that you desire will be accomplished with the least delay.

As to an act of the legislature, we have consulted several of our old members, and they tell me such acts have never, or very rarely, been passed in this State; that they have been uniformly objected to, and the courts considered the proper tribune before which to obtain all remedies, which could be done consistently with the rights of the parties.

We must say that we do not see any utility in a legislative act, even if practicable. Your title in Galveston will, we are sure, be more marketable under decree of the probate or district court than under any legislative act which could be adopted, because,
284 whatever assurances attorneys might give as to the constitutionality and competency of the act, it is unusual and would be regarded with apprehension, whereas we think there could be no distrust of the title under order of court.

We note particularly your desire to have the value of the property in Texas estimated on some legal basis as assets of David White's estate. We do not see that any legislative or Federal declaration of this is practicable.

Without attempting to speak as to your laws or the particular case, it would seem to us that in any proceeding in Alabama in which it should be necessary to fix the value of those lands or of David White's estate in Texas proof of the actual facts would avail you, viz., of what property composed the estate in Texas and its value, as evidenced by sales actually made, whether private or public, proved to be fair and at market prices, or, if not sold, then the actual value to be shown.

As respects the claim against the Galveston City Company on account of stock, that should be included in the inventory of your father's estate, but as a claim under investigation and the facts not sufficiently known to enable any estimate to be made, or if omitted altogether it might be best, as in the event of suit we may prefer to recognize the right of action as in Mrs. Ware and the other devisees of D. White's estate.

The supreme court has not yet decided the case of the David White stock, about which we wrote you.

It is understood that there is a division of opinion among the judges, and that the case may await the organization of the new

court. In conclusion, we repeat that we deem a legislative act impracticable and injudicious.

That administration on Rob't J. Ware's estate for which we have petitioned will enable you to make sale of the Galveston property; and, through Mr. Street, we think the country lands can also be partitioned or sold at an early day after administration, so as to bind the interests of the Whites. We suppose those lands will not bring a great deal any way, and it will be best not to be too exacting of them as respects their lands, especially if thereby a ratification of your Galveston title can be secured.

Yours very truly, BALLINGER, JACK & MOTT.

GALVESTON, *October* 5, 1870.

Thos. J. Molton, Esq., Montgomery, Alabama.

DEAR SIR: We are in receipt, by an accidental mail, of your favor of 29th Sept., all our regular communication with New Orleans on the one side and with the interior of the State on the other being now cut off by quarantine, the offspring of yellow fever panics.

285 We wrote you that the application of Mr. Trueheart for letters of administration, prepared by us, had not been acted on because the constitution abolished our probate courts and vested their jurisdiction in the district courts in the manner to be prescribed by law, and, until legislative action, the received opinion was that the courts could not proceed in matters of that class.

Our legislature, which adjourned in July to meet again in December, passed a law regulating the jurisdiction of the district court in matters of probate.

To appoint an administrator requires an order of the court in term time (except temporarily). Our court will hold its first term the first Monday in next month, November, and continues indefinitely.

In continuation of the chapter of misfortunes to the legal profession, with us, however, the nomination made by the governor of a judge of this district was not acted on by the Senate, and the governor has not made an *ad interim* appointment, so that the situation now is we have no judge, State or Federal—blockaded on all sides and an interregnum of legal justice. The governor wrote us that he would make a *pro tem.* appointment, and our best exertions are being used now to effect that.

The papers are on file, and we can only say that as soon as the court sits and it is practicable we shall obtain the appointment of an administrator and the order of sale, but we cannot undertake to be specific.

We appreciate your impatience and almost feel ourselves personally responsible for the condition of our laws and courts, so adverse to the rights and interests of our clients. God knows this suspension is perfectly harrassing to us. We are almost starving to death. Supplies cut off, literally. Mr. Trueheart has been absent in Virginia during the summer and not yet returned, though now expected back. The supreme court did not decide the case relating to Gal-

veston City Company stock. Our Mr. B., the writer, has been quite indisposed through the summer.

Yours truly, BALLINGER, JACK & MOTT.

GALVESTON, *April* 24, 1871.

Thos. J. Molton, Esq., Montgomery, Alabama.

DEAR SIR: At the recent term of our court the judge declined to grant order of sale in the Ware estate under our new probate law for the reason that no debts against the estate had been probated in Texas. This was the merest cro-chet, but our judges are, unfortunately, addicted to such cro-chets at present. We continue the application, in order to conform to the rulings, next term, in July. Our suggestion is that several thousand dollars of the Alabama debts *versus* the estate be verified by the holders before a notary
286 public and forwarded to Mr. Trueheart here for probate. The form of affidavit to be followed we enclose. The administrator will allow and the judge approve the debts. This will meet the views of the J.

The question of limitation referred to has not been decided by our supreme court.

Very truly yours, BALLINGER, JACK & MOTT.

GALVESTON, *May* 24, 1871.

Thos. J. Molton, Esq., Montgomery, Alabama.

DEAR SIR: For nearly eight weeks I have been confined to my bed at home by sickness, interdicted from business and each effort made in violation of the injunction resulting in a backset. I am now, however, improving substantially and able to look over the letters sent out for my perusal from the office. Among them are several from you, written with great urgency for the sale of the property of Ware's estate in Texas. Doubtless they have been replied to and the situation of matters explained by my partners or Mr. Trueheart, but I write to express my regret that my own condition has been such that I could give no aid to your affairs, though, if I had been well, I could not have done any more, practically, than has been done. Still, from my connexion with them, I felt particular interest and solicitude in them. Trueheart has been your agent for sale, which we stood ready to assist and recommend the title as in the case with Ranger. Legal proceedings were also adopted to make the sale, but, if I understood Col. Jack's reports to me correctly, the district judge, who now has exclusive probate jurisdiction, refused, after repeated arguments, to order the sale. This seems to me, as it did to him, very erroneous and impracticable, and disappointed us very much, but we are in a condition, as to our judges, that we are obliged to put up with things, and have no other alternative.

What Mr. Trueheart has been able to do or the exact attitude of matters in court I don't know. Reading your letters to-day, I felt disposed to write to you, though without anything definite or practical to communicate.

I have been very much out of health since August last; was able during the winter to go continuously into the courts and attend to business at our supreme court in Austin, soon after my return from which I was stricken down by my present attack. Not to bore you with the egotism of an invalid, but to make explanation which seems not improper to our business and friendly correspondence, I mention that my trouble arises from chronic diarrhea, the attacks of which entirely prostrate me; but I have no dysentery or inflammation, nothing wrong about the stomach, and it proceeds from inaction of the liver, sedentary habits, and over-application to business and office duties.

I have so lost strength and seem broken down that, in order
287 to recuperate, I am compelled to have a period of relaxation and rest in a more invigorating climate. I shall leave here about 1st of June for Rockbridge Alum Springs, in Virginia, but my stay there or further movements I do not know, but will depend on what I may learn or consider best for my condition; may go to Canada or to Europe, but hope to return this fall completely restored and to be able to preserve good health in future.

With respect to David White stock in the Galveston City Company, I have heretofore advised you that there was a suit pending in the supreme court, the principles settled in which would go far to determine whether White's heirs could maintain any action, at least whether limitation was in the way; also the nature of the rights of a stockholder where the company claims to have extinguished the stock. This case was argued before our supreme court in January, 1870, and not decided, it being understood that the judges were equally divided. It was again argued in February before the supreme court, but the court has adjourned without deciding it. I have no information as to the opinions of the present judges. Our last constitution provided that limitation should not run from the beginning of the war to its adoption, and the S. C. has sustained this. So that you are at no disadvantage on account of the additional lapse of time in waiting for this decision, which, considering the nature of the case, I think it entirely prudent to do.

As soon as the nature of my health will permit and the course of the courts will enable, I will advise you as to the practicability of suit against the Galveston City Company respecting stock owned by David White. I regard the matter as of much interest and importance and will be very glad to bring the suit whenever I can become satisfied there is a good and reasonable prospect of recovery in it.

I am, sir, very respectfully, your ob't serv't,

W. P. BALLINGER,
For BALLINGER, JACK & MOTT.

GALVESTON, *July* 6, 1872.

Thos. J. Molton, Esq., Montgomery, Alabama.

DEAR SIR: Yours 1st July received and contents noted. I was not at home when your previous letter reached here, and — read it, as our Federal and State courts were both in session and very much engrossing my time. Our supreme court is in session; we are ex

pecting decision in the case against Galveston City Company relative to its stock. One of the counsel opposed to me in the case was at Austin some weeks ago and reports that one of the judges told him it would certainly be decided.

The court is expected to adjourn this month and I trust we shall have a decision during the month.

288 I have no intimation whatever of the views of the court. My own opinion as a lawyer is that after the lapse of time which has occurred limitation is a bar. A suit was tried in our last State district court, brought by the State *vs.* The Galveston City Company, to reform the patent issued for the sale of this city, on the ground of alleged fraud in the procurement of a large excess above the survey entitled to be made. The judge sustained a general demurrer to the bill, holding even the State barred after so great a lapse of time.

The present supreme branch is very little respected for its ability, though the judges, no doubt, labor faithfully to decide correctly.

Very truly, your ob't serv't,

W. P. BALLINGER,
For B., J. & M.

GALVESTON, *June* 17, 1873.

Thos. J. Molton, Esq., Montgomery, Alabama.

DEAR SIR: Your letter was received in the midst of an important trial lasting five days, the last week of our State and Federal court engrossing our entire attention, and has been several days without reply. We have read it carefully; also your recent letters to Mr. Trueheart.

Your information to Trueheart that the funds remitted by him to R. Y. Ware have not been correctly appropriated, that Ware has gone into bankruptcy, and he is left without proper vouchers, gives him great concern and unhappiness and ourselves scarcely less so, as he is a personal friend who was led to take this administration at our suggestion. His correspondence has been mainly, and ours altogether, with you. The administration here was only designed as ancillary to that in Alabama, to aid with the property here in paying debts there, so as to save more valuable and cherished property. You wrote most urgently for remittances to save the estate there. Taking for granted your assurances of the entire solvency of the estate in Alabama and acting in confidence and with anxiety to effect your wishes, remittance was made to the executor there, the proper method, of course, to relieve the estate in Alabama. Mr. Trueheart will write you exact particulars of date, amount, and form of remittance.

We advised you that, in order to give the court here jurisdiction for sale of the lands, claims against the estate must be presented and allowed. You sent out claims of debt against the estate, which were duly allowed and the payment of which was of course the first legal duty and liability of the estate. Mr. Trueheart requested the executor to send him vouchers from those parties. The failure to

get a voucher even from the executor and your letters now on the subject, I repeat, put a very disagreeable complexion on this entire business. Mr. Trueheart is a strict and correct business man, anxious to serve parties with whom he was dealing in confi-
289 dence and taking for granted it could be done safely. Unless debts of the estate are paid in Alabama his obligations as administrator here are first to pay the debts probated here. We think his remittance to the main executor in Alabama for that purpose will discharge him, but he ought not to be permitted to suffer concern or embarrassment. Those claims were sent out by you.

You should procure him a voucher from all those parties recognizing his remittance to the executor as on their account and releasing him, they to look to the executor or estate in Alabama for the amount.

Get their further authority to Trueheart to remit to you the receipts of the estate and he will do so. Unless this is done by you he will have no other alternative but to open direct communication with the creditors and look alone to them both for his past and future security. The payment of debts of the estate in Alabama entitles your wife and other distributees to their properties here; but whilst this is an open question, it is impossible for Trueheart to recognize the interest of your wife or any other distributee or legatee.

If his previous action has not been with sufficient caution he will certainly not repeat it.

We most earnestly appeal to you to take steps at once to put Trueheart right in this business.

Supposing the estate amply solvent, he looked to his administration as intended only to be subordinate to the administration in Alabama. You and the executor sent urgent appeals to save the estate there. No suggestion was made and no other course was possible except to remit to the executor. You knew this would be done. Trueheart deemed himself acting under your instructions. If R. Y. W. was in any condition threatening bankruptcy you must have known it. The claims were sent out by you, and doubtless the parties understood the entire object. We ask you that the creditors, those sent out by you and appearing on the Texas administration, shall approve the remittance by Trueheart. Let them claim the identical funds there—but he must not be involved in any controversy—and then if you expect remittances get authority from those creditors; otherwise you must recognize the necessity he is under of looking alone to the creditors.

We are aware of your services respecting the estate here, and both T. and ourselves have no other than most liberal disposition towards you and will take pleasure in procuring for you all the allowance we can from the court; but we have not been paid or retained a cent of fees, such was our wish to give the estate in Alabama entire benefit of the funds. Place Trueheart on safe ground and first collections shall be on account of fees. Without this he has much more ground of complaint than of obligation, and we must reproach — for not being alive to the necessity of far greater caution on his part

than we supposed necessary. He will write you, we presume,
290 the form of vouchers required by him and of authority to be obtained by you for him to make further remittances.

The supreme court still holds up the case in regard to Galveston City Company stock about which we wrote you. It is understood two of the judges are divided. A third, who is nearly blind, is in wretched health and gives little attention to the business he has to decide, but has not examined the case. Very careful and thorough examination of the subject satisfied us without doubt that the heirs of David White could not recover.

Our Mr. B., the writer of this, begs to say that his health has become excellent. We hand you several of our recent briefs.

Let us hear from you on the subject of this at your earliest convenience. Get Trueheart out of difficulty and we will aid in everything else. With best wishes from our firm, we are most

Respectfully your ob't serv'ts,

BALLINGER, JACK & MOTT.

GALVESTON, *December* 5, 1878.

Thos. J. Molton, Esq., Montgomery, Alabama.

DEAR SIR: The executrix of A. S. Lipscomb's estate is suing a number of purchasers of lots from the heirs of David White. You remember that in 1839 Lipscomb surrendered shares of City Company stock and thereby bought thirty-two Galveston city lots, as follows:

7	lots in block	369,	costing		$2,500 00
4	" "	371,	"		1,900 00
14	" "	370,	"		5,000 00
2	" "	626,	"		3,000 00
1	" "	680,	"		2,500 00
4	" "	686,	"		8,000 00
					$22,900 00

Titles to these lots were taken in Lipscomb's name, though the evidence is plain that they belonged jointly to Lipscomb and David White. Lipscomb, in 1842, sold the 14 lots in block 370. In 1845 Lipscomb conveyed to M. Hunt all the remainder of said lots, the undivided half interest for the heirs of David White, and the remainder to pay a debt to Nicholas Lewis, of North Carolina—amount not stated—on which there is credit of $1,500.

In 1853 Lipscomb sold to League his half of lot No. 2 in 680; also his half of the two lots in block 626 and of the four lots in block 686. League brought suit against the unknown heirs of David White and against M. Hunt, trustee, in 1854, and obtained partition by which the lot 2 in 680, lot 8 in 626, and lots 6 and 7 in 686 were assigned to League, and lot 9 in 626 and 8 and 9 in 686 were assigned to Hunt in trust for heirs of David White.

291 These lots you sold, or the heirs of David White sold, and also sold the 7 lots in 369 and the 4 in 686, except one, which I believe the title is not good to.

Trueheart, as administrator, made the sales on which suits are now pending.

To defend the suits we want proof of some facts: First, the date of the death of David White; also the date of the death of Mrs. David White. Second, we want to prove there was never any settlement between Lipscomb and the executor, administrator, or heirs of David White; nothing ever received from Lipscomb after the death of White by any representative of White. Who can best prove this?

I suppose Mrs. Ware has a general knowledge of the fact. You have also, back to a certain period. I suppose the son or sons of R. J. Ware also know the fact.

Dr. Billingsley came to Texas to get a settlement from Lipscomb. Is he still living? His evidence would be important.

Our purpose will be to show that Lipscomb had in land a large amount of stock belonging to White and himself; 15 shares of it were invested in the preceding lots. The whole of the remaining shares were used and disposed of by Lipscomb and no payment ever made, account rendered, or settlement made with White.

Therefor- the equities of White's estate in these lots are greater than the half interest.

We would regret extremely if the purchasers from Trueheart should fail to maintain their title, as we were doubtless instrumental in causing the sales. You see the points involved, the object we have in view. Please write us, and give us the names and residence of all witnesses by whom we can best make proof in the case. Write at your earliest leisure, as the cases will come up for trial early in January.

We believe Mr. Trueheart is still proceeding with the administration and has met with delays which have prevented the conclusion of the business.

We have continued to counsel with him on all matters he deemed of interest, but have never received a cent of fee or compensation for our services in the business, though we presume we shall do so when he is in funds and sees the end of it. With friendly regards and best wishes,

We are very truly your ob't serv'ts,

BALLINGER, JACK & MOTT.

292 *Agreement Submitting Cause. Filed April* 20, 1886.

U. S. Cir. C't, at Galveston.

ASENATH A. WARE *et al.*
vs.
THE GALVESTON CITY CO. } Ch. 155.

The bill and answer and evidence having been printed for convenience of court at joint expense of pl'ffs & def't—

It is agreed that a formal replication has been filed.

It is agreed that the cause be submitted, and that plaintiffs have

until Aug't 1, '86, to file briefs and written or printed arguments, and the def't to have notice thereof and until Sept. 1, '86, to do the same.

It is further agreed that if the court desires oral argument on the case generally or on points indicated, it will be so argued, at the early convenience of court and counsel, after such indication from the court.

It is agreed that if there is delay in final decision of the cause in the circuit court after the Nov., 1886 term, that plaintiffs may press their application for injunction, which otherwise is to — disposed of with the general case.

G. E. MANN,
BALLINGER & MOTT,
For Def't.

Indorsements: Ch. 155. A. A. Ware *et al. vs.* Galveston City Co. Agreement submitting cause. Filed Ap'l 20, 1886. C. Dart, clerk.

293 *Order. From Minutes. Cause Submitted April* 20, 1886.

ASENATH A. WARE *et al.*
vs.
THE GALVESTON CITY COMPANY. } Equity. 155.

On this day came the parties to this suit, by their solicitors and counsel, and presented to the court the following agreement in writing, signed by them and filed in this cause, to wit:

U. S. Cir. C't, at Galveston, *ss:*

ASENATH A. WARE *et al.*
vs.
THE GALVESTON CITY CO. } Ch. 155.

The bill and answer and evidence having been printed for convenience of court at joint expense of pl'ffs & def't—

It is agreed that a formal replication has been filed.

It is agreed that the cause be submitted, and that plaintiffs have until Aug't 1, '86, to file briefs and written or printed arguments, and the def't to have notice thereof and until Sept. 1, '86, to do the same.

It is further agreed that if the court desires oral argument on the case generally or on points indicated it will be so argued at the early convenience of court and counsel, after such indication from the court.

It is agreed that if there is delay in final decision of the cause in the circuit court after the Nov'r, 1886, term, that plaintiffs may press their application for injunction, which otherwise is to — disposed of with the general case.

G. E. MANN,
BALLINGER & MOTT,
For Def't.

And thereupon the cause was submitted to the court according to said agreement.

294 *Decree Dismissing Bill.*

From Minutes, Nov'r 30, 1886. Ch. 155.

In the Circuit Court of the United States, Eastern District of Texas, at Galveston.

ASENATH A. WARE, DAVID P. LUMPKIN, Mary B. Holtzclaw, J. T. Holtzclaw, Thomas W. Cowles, Daniel White, and Clement White, Complainants,
vs.
THE GALVESTON CITY COMPANY, Defendant. } In Equity. No. 155.

This cause having been submitted to the court at a former term thereof on the pleadings, exhibits, and evidence, and on arguments of counsel for the complainants and defendants, and the court, having now fully heard and considered the same, does thereupon order, adjudge, and decree as follows, viz: That said complainants do take nothing by this suit, and that their said bill do stand dismissed out of this court, and that the complainants shall pay all the costs of this suit, to be taxed by the clerk of this court, and that execution issue against them therefor.

Nov. 30th, 1886.

DON A. PARDEE, *Judge.*

295 *Order Allowing Appeal.*

From Minutes, Nov. 30, 1886. Ch. 155.

U. S. Cir. C't. In Eq.

A. A. WARE *et al.*
vs.
THE GALVESTON CITY CO.

Nov. 30, '86.

On this day, the court having rendered final decree and dismissed the bill in above cause, on application, in open court, of the complainants, Asenath A. Ware, David P. Lumpkin, Mary B. Holtzclaw, J. T. Holtzclaw, Thomas W. Cowles, Daniel White, and Clement White, the court allowed appeal to complainants to the Supreme Court of the United States and fixed amount of appeal bond at five hundred dollars, with two or more sureties, to be approved by the judges of this circuit court of the United States or either of them.

DON A. PARDEE, *Judge.*

296 *Appeal by Complainants and Acceptance of Service by Counsel for Defendant. Filed July* 18, 1888.

U. S. Circuit Court, Eastern District of Texas, at Galveston, in the 5th Circuit.

ASENATH A. WARE *et al.*
vs.
THE GALVESTON CITY COMPANY. } Ch. No. 155.

The above-named complainants, conceiving themselves aggrieved by the final decree entered on the 30th day of November, 1886, in the above-entitled cause, do hereby appeal from it to the Supreme Court of the United States and pray that their appeal may be allowed, and that a transcript of the record, proceedings, and evidence in the cause, duly authenticated, may be sent to the Supreme Court.

M. C. McLEMORE,
S. W. JONES,
G. E. MANN,
Solicitors for Complainants.

In above cause, ch., No. 155, of A. Ware *et al. vs.* Galveston City Company—

We hereby waive notice and citation of appeal to Supreme Court of the United States and hereby accept service thereof.

WILLIE, MOTT & BALLINGER,
Solicitors for Defendant.

July 7, 1888.

Indorsements: "In equity. No. 155. In United States circuit court for the eastern district of Texas. Asenath A. Ware *et al.*, No. 155, in chancery, *vs.* The Galveston City Company. Appeal allowed. Bond fixed, $500. C. B. Sabin, U. S. district judge. Filed July 18, 1888. C. Dart, clerk."

297 *Appeal Bond. Filed July* 18, 1888.

U. S. Circuit Court, Eastern District of Texas, at Galveston, in 5th Circuit.

ASENATH A. WARE *et al.*
vs.
THE GALVESTON CITY COMPANY. } Ch. No. 155.

Know all men by these presents that we, Asenath A. Ware, David P. Lumpkin, Mary A. Holtzclaw, and James T. Holtzclaw, her husband; Thomas W. Cowles, Daniel O. White, and Clement B. White and Walter Gresham and Frank M. Spencer, are justly and firmly bound unto the Galveston City Company in the full and just sum of five hundred dollars, to be paid to the said Galveston City Company, attorney or assigns; to which payment, well and truly to be

made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 5th day of July, A. D. 1888.

Whereas lately, at the November term, 1886, of said court, in said suit, depending in the circuit court of the United States at Galveston, between Asenath A. Ware, D. P. Lumpkin, Mary A. Holtzclaw, and J. T. Holtzclaw, Thos. W. Cowles, D. O. White, and C. B. White, plaintiffs, and The Galveston City Company, the defendant, a decree was rendered against said plaintiffs, and said plaintiffs having applied then and there in open court for permission to appeal to the Supreme Court of the United States, and appeal having been allowed plaintiffs by said court in open court and bond for appeal fixed by said court at five hundred dollars; and whereas citation and notice for appeal having been duly waived and service accepted of notice of appeal on the — day of July, A. D. 1888, by solicitors for defendant:

Now, the condition of said above obligation is such that if the said plaintiffs shall prosecute their appeal to effect and
298 answer all damages and costs if they fail to make their plea good, then the above obligation to be void; otherwise to remain in force and virtue.

Sealed and delivered.

ASENATH A. WARE.	[SEAL.]
DAVID P. LUMPKIN.	[SEAL.]
MARY A. HOLTZCLAW.	[SEAL.]
JAMES P. HOLTZCLAW.	[SEAL.]
THOMAS W. COWLES.	[SEAL.]
DANIEL O. WHITE.	[SEAL.]
CLEMENT B. WHITE.	[SEAL.]

All the above persons acting herein and signing this instrument by their attorney-in-fact.

J. R. CORYELL.	[SEAL.]
WALTER GRESHAM.	[SEAL.]
FRANK M. SPENCER.	[SEAL.]

The sureties to the above bond are satisfactory to us.

WILLIE, MOTT & BALLINGER,
Att'y- for City Co.

Indorsements: "No. 155. In U. S. circuit court, E. D. T. In equity. Asenath A. Ware *et al. v.* The Galveston City Co. Approved July 18, 1888. C. B. Sabin, U. S. district judge, E. D. T. Filed July 18, 1888. C. Dart, clerk."

299 In the Circuit Court of the United States for the Eastern District of Texas, at Galveston.

I, C. Dart, clerk of the circuit court of the United States for the eastern district of Texas, at Galveston, in the fifth circuit and district aforesaid, do hereby certify the foregoing to be a true and cor-

rect copy of the record and of all proceedings in the case in cause No. 155, on the equity docket of said court, entitled Asenath A. Ware *et al. vs.* The Galveston City Company, as the same now appears on file and of record in my office.

To certify which witness my hand and the seal of said court, at Galveston, in said district, this the 21st day of July, A. D. 1888.

[Seal United States Circuit Court, Eastern District of Texas.]

C. DART,
Clerk U. S. Circuit Court, E. D. T., at Galveston.

[Endorsed:] No. 155. Equity. United States circuit court, eastern district of Texas. Asenath A. Ware *et al. vs.* The Galveston City Company. Copy of record and proceedings.

Endorsed on cover: Case No. 13,425. E. Texas C. C. U. S. No. 289. Asenath A. Ware, David P. Lumpkin, Mary A. Holtzclaw, and J. T. Holtzclaw, her husband; Thomas W. Cowles, Daniel O. White, & Clement B. White, appellants, *vs.* The Galveston City Company. Filed November 5, 1888.

028 146 U S 102

Office Supreme Court U. S.
FILED.
DEC 26 1882
JAMES H. McKENNEY,
CLERK.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

(IN EQUITY.)

ASENATH A. WARE et al., Appellants,

vs.

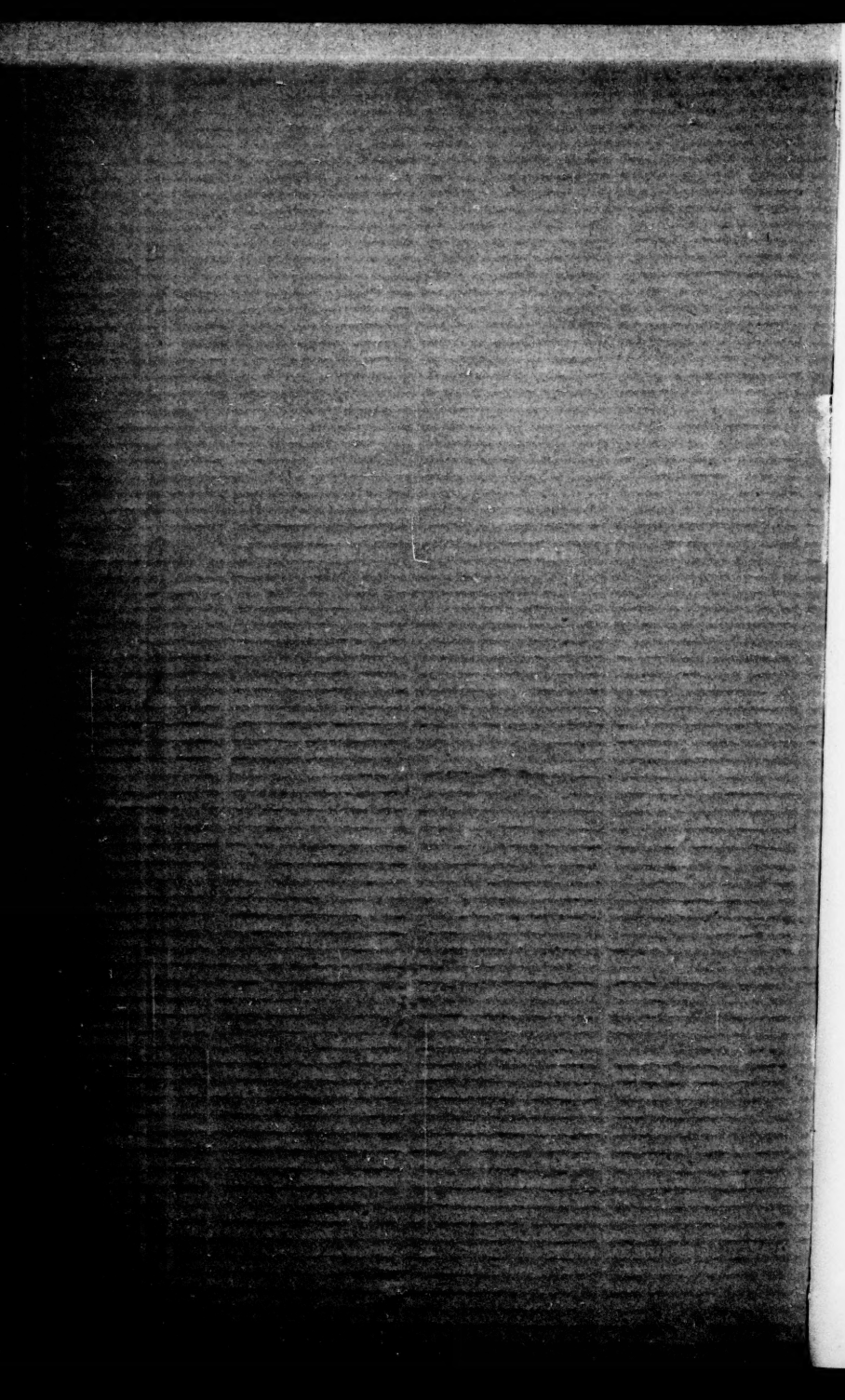
THE GALVESTON CITY COMPANY, Appellee.

Complainants' Brief and Points

ON APPEAL FROM THE DECISION OF THE CIRCUIT COURT OF THE UNITED STATES, EASTERN DISTRICT OF TEXAS, FIFTH CIRCUIT.

WALTER GRESHAM,
Counsel of Record, joined by
M. C. McLEMORE,
S. W. JONES,
G. E. MANN,
Of Counsel for Complainants, Appellants.

Clarke & Courts, Stationers, Printers, Lithographers, Galveston.



IN THE

SUPREME COURT

OF THE

UNITED STATES.

(In Equity.)

U. S. SUPREME COURT.

Asenath A. Ware, David P. Lumpkin, Mary A. Holtzclaw, and James T. Holtzclaw, her husband; Thomas W. Cowles, Daniel O. White, and Clement B. White, Appellants,
vs.
The Galveston City Company.

Complainant's Brief and Points on Appeal from the Circuit Court, Fifth Circuit.

STATEMENT OF THE CASE.

The Bill of Complaint was filed herein by the heirs of David White, deceased, on March 18, '81. Answer was filed by appellee July 3, '82. On April 20, '86, the case was submitted on the evidence (272).

(1) Figures in brackets are the top pages of the printed record.

The decree was a dismissal of the Bill (274). No opinion was given by the Court. Appeal duly perfected (275,176).

This suit is for certificates for twenty-four shares of stock of the company, issued to David White and placed by him in the hands of Abner S. Lipscomb, with a power of attorney authorizing him to sell. Twenty of said certificates were renewed by the company, after White's death, in fraud of his estate, with-

out any consideration or benefit to White's estate, and without any of the formalities required by the certificate, or the authority which under the certificates originated. Three were changed by the company from name of principal to name of the attorney in fact, in fraud of the rights of the principal, seven days before the principal died in the State of Alabama. The answer confesses the transfer, and renewal by the company, after White's death, and without any formal transfer of the certificates, and the putting three shares in the attorney in fact's name; and alleges as grounds of defense:

1. That the certificates were endorsed in blank by the attorney in fact before White's death. To this we say: There was no evidence to support this matter of avoidance, and, to the contrary, as to sixteen shares, the evidence is complete, that the certificates were in the hands of the attorney in fact three months after White's death.

2. In further avoidance the answer alleges that the company did not require any formal transfer of certificates, but disregarded the provisions of the deed of trust under which they originated, and the terms of certificates as to transfer.

The evidence shows that the company did utterly disregard the terms of the deed of trust and certificates, and issued new certificates to the holders of the old, with but the signature of White by his attorney in fact on the back of the certificate. Sixteen of these twenty-one certificates, issued to and standing in the name of David White, were so taken up by the company three months after White's death; and four of these twenty-one, several years after White's death and after inquiry made of the company by his executors, and statement of the company that the certificates were outstanding. Three of the twenty-four sued for were transferred by the company from the name of the principal to that of the attorney in fact, seven days before White died, under the blank endorsement of David White, per Abner S. Lipscomb, attorney in fact. Three months after White's death the attorney in fact was permitted, by the company, to transfer these three shares to a third party. The evidence shows that White's estate never got any consideration or benefit for these shares.

3. As further matter of avoidance the company says that the attorney in fact, Lipscomb, was a partner of White as to the stock and had the right, as such, to dispose of it as he did.

The evidence does not show a partnership, but, to the contrary, all the acts of the attorney of White, with the company, even to the transfer of certificates to his own name, were done by Lipscomb in the name of White. and purported to be under au-

thority of the power of attorney. When White's executor made demand on the company, in 1854, to be allowed to examine their books, as to the transfers of stock, the company refused, but made a written statement that all the certificates of shares, owned by White, had been duly transferred under his power of attorney. The evidence further shows, that the company only recognized and dealt with Lipscomb as to the White stock, as attorney in fact for White. The allegation of partnership is an afterthought, set up for the first time thirty years after the company made the transfers purporting to be made under the power of attorney. The allegation is made by the attorney of the company without any facts to support it furnished by the company or from its books.

4. The company sets up the limitations and stale demand. The evidence shows that after White's death his executor sent an agent to Texas, and on demand the company in June, 1843, reported only four of the certificates issued to White were outstanding, and others had been surrendered under White's power of attorney to Lipscomb, and in 1854, on further demand on the company, a statement was formally made in writing by the agent that all the White shares had been duly transferred. The executors and heirs of White relied on these statements, until it was accidentally discovered by plaintiffs, a short time before the bringing of this suit, that the statements of this company were not the facts and the shares had not been duly transferred, but, to the contrary, had all been bought by the company under the fraudulent acts of the company, without any transfers authorized by White or his representatives.

SYNOPSIS OF THE BILL.

Recites the history of the Galveston City Company. The land (its capital stock) was owned by several persons, who, in 1837, conveyed the land to trustees for the issuance of one thousand shares, to be represented by certificates, one for each share, transferable by assignment in writing and signed and sealed and acknowledged by the transferer in the presence of two witnesses before any justice of the peace or notary public. In 1838 the stockholders instructed application to be made for an incorporation, and the company was incorporated in 1841 (2). The form of original trustee certificates specifying by their terms the requirements as to transfer is set out in full (6). David White owned sixty-seven shares under original issue to him. In 1838 a resolution of the stockholders was passed to call in the trustees' certificates and to issue in lieu thereof certificates transferable

out any consideration or benefit to White's estate, and without any of the formalities required by the certificate, or the authority which under the certificates originated. Three were changed by the company from name of principal to name of the attorney in fact, in fraud of the rights of the principal, seven days before the principal died in the State of Alabama. The answer confesses the transfer, and renewal by the company, after White's death, and without any formal transfer of the certificates, and the putting three shares in the attorney in fact's name; and alleges as grounds of defense:

1. That the certificates were endorsed in blank by the attorney in fact before White's death. To this we say: There was no evidence to support this matter of avoidance, and, to the contrary, as to sixteen shares, the evidence is complete, that the certificates were in the hands of the attorney in fact three months after White's death.

2. In further avoidance the answer alleges that the company did not require any formal transfer of certificates, but disregarded the provisions of the deed of trust under which they originated, and the terms of certificates as to transfer.

The evidence shows that the company did utterly disregard the terms of the deed of trust and certificates, and issued new certificates to the holders of the old, with but the signature of White by his attorney in fact on the back of the certificate. Sixteen of these twenty-one certificates, issued to and standing in the name of David White, were so taken up by the company three months after White's death; and four of these twenty-one, several years after White's death and after inquiry made of the company by his executors, and statement of the company that the certificates were outstanding. Three of the twenty-four sued for were transferred by the company from the name of the principal to that of the attorney in fact, seven days before White died, under the blank endorsement of David White, per Abner S. Lipscomb, attorney in fact. Three months after White's death the attorney in fact was permitted, by the company, to transfer these three shares to a third party. The evidence shows that White's estate never got any consideration or benefit for these shares.

3. As further matter of avoidance the company says that the attorney in fact, Lipscomb, was a partner of White as to the stock and had the right, as such, to dispose of it as he did.

The evidence does not show a partnership, but, to the contrary, all the acts of the attorney of White, with the company, even to the transfer of certificates to his own name, were done by Lipscomb in the name of White. and purported to be under au-

thority of the power of attorney. When White's executor made demand on the company, in 1854, to be allowed to examine their books, as to the transfers of stock, the company refused, but made a written statement that all the certificates of shares, owned by White, had been duly transferred under his power of attorney. The evidence further shows, that the company only recognized and dealt with Lipscomb as to the White stock, as attorney in fact for White. The allegation of partnership is an afterthought, set up for the first time thirty years after the company made the transfers purporting to be made under the power of attorney. The allegation is made by the attorney of the company without any facts to support it furnished by the company or from its books.

4. The company sets up the limitations and stale demand. The evidence shows that after White's death his executor sent an agent to Texas, and on demand the company in June, 1843, reported only four of the certificates issued to White were outstanding, and others had been surrendered under White's power of attorney to Lipscomb, and in 1854, on further demand on the company, a statement was formally made in writing by the agent that all the White shares had been duly transferred. The executors and heirs of White relied on these statements, until it was accidentally discovered by plaintiffs, a short time before the bringing of this suit, that the statements of this company were not the facts and the shares had not been duly transferred, but, to the contrary, had all been bought by the company under the fraudulent acts of the company, without any transfers authorized by White or his representatives.

SYNOPSIS OF THE BILL.

Recites the history of the Galveston City Company. The land (its capital stock) was owned by several persons, who, in 1837, conveyed the land to trustees for the issuance of one thousand shares, to be represented by certificates, one for each share, transferable by assignment in writing and signed and sealed and acknowledged by the transferer in the presence of two witnesses before any justice of the peace or notary public. In 1838 the stockholders instructed application to be made for an incorporation, and the company was incorporated in 1841 (2). The form of original trustee certificates specifying by their terms the requirements as to transfer is set out in full (6). David White owned sixty-seven shares under original issue to him. In 1838 a resolution of the stockholders was passed to call in the trustees' certificates and to issue in lieu thereof certificates transferable

only on the books of the company. The company has bought up most of its stock by selling part of the land—its capital—therefor. David White, on April 8, 1839, gave Abner S. Lipscomb a power of attorney to sell his shares (7). On December 3, 1841, the company, without authority, transferred three of the certificates (numbers 33, 36 and 37, book C,) from the name of White to that of Lipscomb, issuing to Lipscomb one certificate therefor. On December 10, 1841, David White died, and plaintiffs are his heirs at law (8 and 9). At the time of White's death he owned, beside the said shares so illegally transferred by the company to his attorney in fact, twenty-one shares standing in his (White's) name, of which the numbers are set out in the bill (8). That White's estate, outside of this stock, was solvent and all debts paid and there is no pending administration and no necessity for administration. That the widow of David White is dead and plaintiffs are her only heirs at law and as such own said shares. That after White's death Lipscomb, with the coöperation and consent of the company, transferred the certificates representing said stock and the company issued renewal certificates therefor to third parties. A form of renewal certificates is set out in full (10). The company have since bought and hold said shares sued for. That the company and its agents have concealed the facts relating to these transfers of stock and the illegal act of Lipscomb and the company. The company refusing access to its books and information as to the transfers, and the facts have only been known to plaintiffs within two years previous to this suit (11). That plaintiffs were minors and non-residents. That Lipscomb died in 1856 insolvent and had never accounted for these shares to White's estate or heirs (12). Prayer for discovery and certificates or the value of the shares.

SYNOPSIS OF THE THIRTY PAGES OF PRINTED ANSWER.

14. Stale demand and statute of limitations. That the shares sued for have all been bought up by the company and value paid therefor by the defendant (the company). That the outstanding stock is all in the hands of innocent purchasers for value. That plaintiffs have no right to sue because they do not allege that David and Mary White died intestate.

15. History of David White's connection with the company, especially as to the debt of the company; to him citing the case of Scott vs. the Company as to the facts.

16. That White did not buy the shares sued for but took them for a debt from the company. Admits the forms of the trustee certificates as given in the bill. Admits passage of the ordinance by board of directors as alleged in bill on December 13, 1838. Denies that the joint stock company in existence prior to February 5, 1841, was incorporated, but says it was the stockholders who were incorporated. Admits that David White owned stock at the date of incorporation. Admits that the company has sold part of its land (its capital) but denies that the sales have amounted to anything like a million dollars. Admits that a large part of the company's land is unsold, but alleges that it is only of prospective value and not worth $500,000 or near it.

17. Alleges that at first the company sold for cash but that at an early day it became the policy of the company to sell its land, except to defray expenses, for stock of the company, which was thereby extinguished and canceled; by this policy all but 45 shares of the company have been canceled by the company.

Alleges that the only dividend declared by the company was about $1980 in value per share, and was declared about five years before this suit. That the company has $42,000 of bonds outstanding against it. That the market value of the stock is about $9000 per share.

17 and 18. Admits the power of attorney from David White to A. S. Lipscomb as set out in the plaintiffs' bill. Denies the date of delivery of certificates by White to Lipscomb, and alleges that David White himself transferred a large number to third parties. Alleges that it is defendant's belief that White and Lipscomb had a joint interest in all shares held by Lipscomb and standing in name of White, and alleges that the power of attorney was coupled with an interest in Lipscomb. Repeats White's connection with the history of the company.

19. Long and eloquent eulogy on Abner S. Lipscomb, and alleges that a joint interest in this stock was the reason of his coming to Texas. Admits the surrender to the company by Lipscomb on December 3, 1841, of three of the certificates sued for, and that the company on that date issued to Lipscomb certificate therefor in his (Lipscomb) own name.

20. Denies that Lipscomb held said three shares as agent for White, but alleges said partnership interest of Lipscomb in said shares, and further alleges that the endorsements on the back of said certificates is "Abner S. Lipscomb, attorney in fact for David White." That the trustee certificates passed currently at that day by blank endorsements, and practice only required defendent by its uniform practice and usage to be satisfied that the

signature of the endorser was genuine to entitle holder to get a new certificate in the name of the holder. As to these three shares the defendant alleges that it does not know but what they may have been in circulation under such blank endorsement and cannot allege as to the same. That the presumption from character of defendant's officers and death of all the parties and length of time is that such was the case as to these three certificates. That these certificates were endorsed by Lipscomb, but who to, when and where defendant does not know, but the company issued new certificates to Love on them on March 4, 1842.

20. That the company denies that said transfers were not legal and not authorized, and denies any consent, connivance or lack of authority or fraud on the part of the company; and if fraudulently done by Lipscomb defendant did not participate, but had reason to believe same was valid and in good faith. Don't know when White died. That White left a will disposing of his property in a manner wholly different from manner claimed by plaintiff, and reiterates that plaintiffs have no right to sue as heirs at law. Denies that White owned twenty-four shares at the time of his death.

21. That sixteen of the shares sued for were transferred and delivered on the 1st of July, 1841, in the presence of Levi Jones and John P. Borden, Lipscomb signing his name as attorney in fact for D. White, except as to No. 120, which is signed Abner S. Lipscomb, attorney for David White; No. 34 was signed Abner S. Lipscomb, and defendant alleges that this was by mere mistake and inadvertence, and No. 44 was signed Abner S. Lipscomb, attorney in fact, omitting for said White, and that Nos. 45, 48 and 49 are signed by said Lipscomb, attorney in fact for D. White, and said certificates were so endorsed and assigned in blank. Repetition of the allegation that the stock circulated with the blank endorsement, and denies that the company has any knowledge as to whom Lipscomb transferred these shares, and reiterates that it was the custom of the company to recognize such endorsements as transfers.

22. Nos. 10 and 28, book C, are endorsed: "I assign the within certificate to Ashbel Smith. David White, by Abner Lipscomb, attorney in fact; witnesses, B. F. Tankersley and George H. French." No. 12, book C, is same except there is another name as witness, which is illegible. No. 27, book C, is assigned exactly same as to witnesses and in all respect as 10 and 28, except it is to Levi Jones. That the company believes from the appearance of said endorsements that they were in blank and after probably passing through various hands in due course of business they were filled as they now appear. That there are no dates to

said endorsements, but the defendant believes that they were endorsed before White died. That after White died these aforesaid sixteen certificates were on March 4, 1842, surrendered by James Love, and defendant issued to him new certificates. That Nos. 10, 12 and 28 were renewed to Smith March 5, 1845. Reiterates that Lipscomb and White were partners and that Lipscomb had the right to transfer after the death of White, but denies that they were transferred after the death of White, and if there was fraud the company did not participate, and company believed transfers were during White's lifetime, and company was imposed upon by powers entrusted to Lipscomb, and the company paid full value for all said shares when it bought them under its custom of selling land for its stock, and this should estop plaintiffs.

23. Denies that White paid his debts or was solvent at the time of his death. That W. B. Lipscomb administered on the estate of White in Texas and brought suit against M. B. Menard and Levi Jones. That the legal representatives of White had full knowledge of all the facts concerning the stock and full access to the books of the company and set up no charge of fraud against the company.

24. That the company don't know that the plaintiffs are the proper parties to sue. Denies that any of the certificates were transferred by Lipscomb after the death of White.

25. Allege that the company bought the stock and gave full value for it in good faith, with no evidence of any facts that would cause doubts as to the validity of the endorsements by Lipscomb. Eulogy on Gail Borden, agent of the company. Denies that the transfer of shares were made after the death of White and that they are void or that the company has done any illegal act or is responsible to complainants.

26. Admits that the certificates for the shares sued for were all taken up by the company for property given by the company for them. That the company has no data as to transfer of trustees' certificates unless shown on the certificates, and when such data was matter of interest to the company it made examination to its own satisfaction. That the stock ledger is still in the possession of the company. Denies any concealment of facts as alleged in bill relating to these shares or that the company concealed any illegal acts of Lipscomb because Lipscomb did nothing illegal. Denies withholding facts from complainants, and says that up to April 21, 1858, all its books, records and papers were open for inspection.

27. That Ware, executor, was furnished by the company with a full statement of the White shares, showing date of issuance of share issued to David White or in his name, and the date at which the holder of said stock surrendered the same to the company, and when they were canceled by the company and new certificates issued to the holders.

That the company in April, 1858, closed its books against examination to protect the public in titles under the company and itself from harrassment and litigation. Denies any application by Molton, for plaintiffs, to the company for information as to the stock.

28. Pleads laches. Alleges that Lipscomb died insolvent. Alleges that Lipscomb fully accounted to Ware for all the stock so sued for.

29. Alleges that Lipscomb admitted to Ware and others that third parties were liable for some of this stock. That those who represented White's estate, knowing all these facts, made no charges of fraud against the company as to this stock.

30. Up to and since 1858 all bona fide applications for particular information has been given, and the order closing the books is a mere pretext for allegations in the bill. Again pleads stale demand. Admits that the defendant has the original certificates of the shares sued for. Alleges that R. J. Ware bought all the complainants' interest. Denies that complainants can sue as heirs at law.

31. Shares were worth $150 when White died and now $9500, and original stockholders have all passed out of the company. Alleges that the present shareholders are innocent holders for value, and it would be inequitable to allow them to recover.

32. Plea of limitation and stale demand. Letter of Ashbel Smith, who transferred three of the certificates in 1845, annexed as an exhibit and as a part of the answer of the company. This letter is to the attorney of defendant, and dated June 10, 1882.

ASSIGNMENT OF ERRORS.

Plaintiffs say the Circuit Court committed error to their injury and prejudice as follows, and as more particularly specified in the following brief and argument:

1. In not holding that the provisions of deed of trust, under which the joint stock unincorporated company was formed, prescribes how the transfers of certificates are to be made, and is a partnership agreement, and is obligatory on the company and legal title to shares can not pass except by transfer of certificate in manner prescribed.

2. In not holding that it is the duty of the corporation to see that transfers are formal and in accordance with the provisions of the deed of trust, under which the certificates were issued before the joint stock company was chartered as a corporation.

3. In not holding that when the company recognized Love as owner of the sixteen shares, and Smith an owner of three, and Jones of one, after White's death, and without any transfer to them, it was at the risk to the company of having to show that the holders of the certificates were owners of the shares and acquired them before White's death.

4. In not holding that when the company permitted Lipscomb to surrender three shares, or certificates thereof, on his endorsement as attorney in fact for White and issued him certificates for the shares in his own name, and this was done but seven days before White died in Alabama, and the company three months afterward allowed Lipscomb to transfer these shares to Love, it devolves on the company to show that Lipscomb did, in point of fact, own the three shares, or that the plaintiffs or White's estate received the benefit of them, and, having failed to do so, the plaintiffs must recover these shares.

5. In not holding that there is no evidence of any transfer, sale or assignment by Lipscomb to any one of the sixteen shares for which he drew the order on Love in favor of White's executor, and to the contrary, Love held them for Lipscomb, and the company, having no authority to permit Love, President of the corporation, to issue certificates to himself on his surrender to the company of these sixteen certificates. They, the plaintiffs, must recover these sixteen shares. And in that contemplation of law what was undertaken to be done is void.

6. In not holding that the three shares transferred by Smith in 1845 and the one transferred by Jones in 1844, being the four shares, the original certificates for which were outstanding when the agent of the company reported in June, 1843, to White's executor, that these certificates being outstanding the company could make no statement as to them, and the company, having recognized the holders of the certificates, Jones and Smith, as

the owners, and issued new certificates to them for said shares, without any transfer, it devolves upon the company to show that Jones and Smith owned these shares.

7. In not holding that the facts show that White's representatives have been diligently seeking to ascertain the facts in the possession of the company ever since White's death and have been prevented from doing so and have been misled as to the true facts by the acts and concealment of the company.

8. In not holding that, after the action of the company in denying access to their books and papers and reporting that transfers had been duly made, and in view of endorsements on the certificates, called transfers by the company, being in the custody of the company and parts of its records, the company can not be heard to say that plaintiffs' demand is stale.

9. In not holding that the evidence shows that if Lipscomb was a partner at all, it was in proceeds of sale and reinvestment of the stock, and that as to the sixteen shares converted by Love, they were the individual property of White's estate, as were four more trustee certificates held by Lipscomb after White's death.

10. In not holding that the company, the defendant, has confessed the plaintiffs' case and alleged matters in avoidance which are in part not sustained by the evidence, and as to the rest are not sufficient in law.

In that the answer admits that twenty of the shares sued for were evidenced at the time of White's death by trustee certificates issued to White and in his name, and by the terms of the certificate and the deed of trust under which they were issued, only to be assigned by endorsement under hand and seal in the presence of two witnesses before any justice of the peace or notary public.

The answer confesses that after White's death the company issued new certificates to third parties, in renewal of these certificates, without the requirements of the trustee certificates as to the transfers being complied with.

The evidence is sixteen of them were renewed by the company to the third parties without any endorsement at all only "Abner S. Lipscomb, attorney in fact for David White," written on the back, with "James Love" written below and two witnesses, whose signatures, from their position, would seem to have been as witnesses to the signature of Love, and one of the certificates had only "A. S. Lipscomb" written on it.

As this does not even purport to be an assigment by White to Love, and does not show that Lipscomb, attorney in fact for

White, ever intended to transfer the certificate to any one. The answer of the company attempts to avoid the legal conclusion, that there had been no transfer, by alleging that a custom had grown up of endorsing in blank, and the company recognized the holder of a trustee certificate with a blank endorsement without any endorsement as the owner, except when for its protection it saw fit to inquire into the rights of the holder.

The company claims further, in avoidance, that this custom of its own to ignore the provisions of the trust deed, under which the certificates were issued, and the terms of the certificates themselves, annulled these provisions, and made the holder of the certificate the owner as against the real owner who had made no transfer; and that though White was dead, and during his life had been a non-resident, and the only transfer of a certificate shown to have been personally transferred by him was to John Rugely, and was formally transferred according to the terms of the certificate, he is still bound by the custom of the company dispensing with an assignment and recognizing holder of a certificate to be the owner.

The power of attorney shows White did not consent or agree to the passing of certificates without formal transfer, as he executed formal power of attorney authorizing Lipscomb to sell, and this was recorded.

The company further says in connection with this, its claim of avoidance, that the court should presume that the certificates had been sold before White's death, and had been in circulation under the company's custom not to require further evidence of ownership than the possession of the certificate.

11. In not holding that as administration on estates of David and Mary White had been closed before this suit was filed, and there were no debts against said estate, and the plaintiffs were both devisees thereof and heirs at law of David and Mary White, they had the right to elect to sue as heirs at law.

POINT I.

That the provision of a deed of trust authorizing an unincorporated company to issue certificates of stock to evidence the rights of the owners of its stock, and prescribing the way in which transfers of these certificates can be made is analogous to the provisions made in

charter of an incorporated company and equally obligatory.

Cowdrey vs. Vandenburg, 101 U. S., 574, 575.
Waterman on Corporations, Vol. 1, §10, pp. 37-39.
Morowitz on Corporation, §§169, 163, 208, 322.
Union Bank vs. Laird, 2 Wheat, 390.
Cook on Stocks and Stockholders, §504.

(a) That the provisions of the certificates as to formalities of transfer cannot be ignored by the company unless it assumes the risk and burden of showing that the holder to whom the company renewed was the real owner.

Shaw vs. Railroad, 101 U. S., 564, 566.
Bank vs. Lanner, 11 Wall, 378.
Telegraph Co. vs. Davenport, 97 U. S., 369.
Thompson vs. Pervene, 106 U. S., 592, 593.

STATEMENT.

The Galveston City Company was a joint stock unincorporated company from 1837 to its incorporation in 1841. Its capital was land held by trustees under a deed of trust, which was its articles of co-partnership. This deed of trust provided for the issuance of 1000 shares of stock (34), and the terms of this deed of trust as to transfers were (34):

"The certificates shall be transferable by assignment made in "writing thereon and signed and sealed by the holder and ac- "knowledged in the presence of two witnesses before any justice "of the peace or notary public."

The heading of each of these certificates explained how they were issued and how the deed permitted assignment by recitation as follows (9) (16):

"The proprietors, M. B. Menard, Robert Triplett, Sterling "Neblett and William Fairfax Gray, conveyed to the under- "signed, as trustees, by their deed of the 15th of June, 1837, a "league and labor of land containing 4605 acres, on the east "end of Galveston island, to be sold as joint stock in 1000 "shares."

"By the terms of said deed, certificates of shares when issued "are to be assigned by endorsement under hand and seal, in the "presence of two witnesses, before any justice of the peace or "notary public."

The shares sued for were evidenced by certificates, one for each share, issued November 7, 1838, and which, except as to the respective numbers of the certificates, are as follows:

"CITY OF GALVESTON IN ONE THOUSAND SHARES.

"The proprietors, M. B. Menard, Robert Triplett, Sterling " Neblett, and Wm. Fairfax Gray, conveyed to the undersigned " as trustees, by their deed of the 15th of June, 1837, a league and " labor of land, containing 4605 acres, on the east end of Galves- " ton island, to be sold as joint stock in 1000 shares.

"By the terms of said deed, certificates of shares when issued " are to be assigned by endorsement, under hand and seal, in the " presence of two witnesses, before any justice of the peace or " notary public.

"The trustees, any two of whom may act, are to call a meeting " of the shareholders when deemed advisable.

"In the proceedings of the stockholders in general meeting " each share to be entitled to one vote, and to be represented in " person or by proxy, and a majority interest to determine all " questions which may arise. The company may prescribe such " rules and regulations for its government and management and " give such orders and directions to the trustees for the sale of " lots or any other purpose as it may think promotive of the " general interest.

"CERTIFICATE OF STOCK. BOOK—, NO.—.

"This is to certify that we, Levi Jones, William R. Johnson, " and Thomas Green, trustees of the city of Galveston, in con- " sideration of——, do grant, bargain, and sell to David White, " his heirs and assigns forever, one share, No.—, in the city of " Galveston, to be holden and enjoyed by him and his assigns " upon the terms prescribed in the deed bearing date of the 15th " of June, 1837, of M. B. Menard, Robert Triplett, Sterling Neb- " lett, and William Fairfax Gray, constituting us the trustees, " and in the agreement entered into between us and the stock- " holders in said city, as set forth in the proposal for subscrip- " tion.

"Witness our hands this 7th day of November, 1838.

"LEVI JONES,
"THOMAS GREEN,
"*Trustees.*"

David White, to whom they were issued, died in Alabama December 10, 1841. He had placed the certificates sued for in Texas in the hands of Abner S. Lipscomb, and had given him power of attorney, as follows:

"UNITED STATES OF AMERICA,
"State of Alabama, City and County of Mobile.

"Know all men by these presents that I, David White of the "city of Mobile, have and by these presents do make, constitute, "and appoint Abner S. Lipscomb my true and lawful attorney- "in-fact for me and in my name to alien, release, assign, and "convey any or all of my Galveston stock or any stock or inter- "est I may have in the city of Galveston, on Galveston island, "in the Republic of Texas, or any real estate or town lots I may "be entitled to, in law or equity, in the town of Matagorda, in "the said Republic of Texas, hereby ratifying and confirming "the acts of my said attorney-in-fact, which he may do, execute, "or perform in as full and ample manner as I could myself if "personally present.

"In testimony whereof I have hereunto put my hand and seal "this the 8th day of April, A. D. 1839.

[SEAL] DAVID WHITE.

Witness:
DAVID FILES."

David White acknowledged this on same day before clerk of the United States Circuit Court, and it was recorded in records of Galveston county, April 22, '39. (229 and 230.)

The transactions between the company and Abner S. Lipscomb as to the stock was all done under this power of attorney. Gail Borden, jr., the then agent of the company, stated, in writing to the agent of the executor of David White in June, 1843: "The business has been done by Judge Lipscomb by power of attorney from D. White." This was stated in connection with a statement made at the request of White's executor from the books of the company to show what Lipscomb had done with the shares. (49), (47), (107.)

The power of attorney from White was not filed with the company but recognized as of record (94) by the agent of the company in charge of the office since 1854. (39.)

After the death of David White the company issued certificates in renewal of 20 of the original certificates issued to and standing in the name of David White, and the evidence shows that the company did utterly disregard the terms of the deed of trust and certificates as to requisites for transfer and issued these new certificates to the holders of the old, with the signature of White, by his attorney in fact, on the back of the certificate. Sixteen of these twenty-one certificates issued to and standing in the name of David White were so taken up by the company three

months after White's death, and four of these twenty several years after White's death and after inquiry made of the company by his executors and statement of the company that the certificates were outstanding. Three of the twenty-four sued for were transferred by the company from the name of the principal to that of the attorney in fact seven days before White died under the blank endorsement of David White, per Abner S. Lipscomb, attorney in fact. Three months after White's death the attorney in fact was permitted by the company to transfer these three shares to a third party. The evidence shows that White's estate never got any consideration or benefit for these 23 shares. Twenty trustee certificates were standing in White's name on books of the corporation at his death. Sixteen of these were as follows: Out of book "A" numbers 116, 118, 119, 120, 121, 122 and 124, and the following of said certificates out of book "C:" Nos. 34, 42, 43, 44, 45, 46, 47, 48 and 49, and each and all endorsed by the said Lipscomb, the endorsements thereon dated July 1st, 1841, the said Lipscomb signing the same with his name and as attorney in fact for said David White, except that No. 120 is signed Abner S. Lipscomb, attorney for David White; No. 34 was signed by Abner S. Lipscomb, omitting said attorneyship; No. 44 was signed "Abner S. Lipscomb, attorney in fact," omitting for said White, and Nos. 45, 48 and 49 are signed by Lipscomb, att'y in fact for D. White. (56 to 65.)

*In June, 1843 (47), the company rendered a statement to White's executor showing (67) certificates issued by the trustees to White, and that four of these had not been presented to the company and were still outstanding, and (63) had been canceled for lots or renewed by issuance to transferees (47-48).

In 1854 the present agent and secretary of the company made a further report to the executor of David White (which is "Exhibit B" between pp. 48 and 49) and stated officially that all the certificates originally issued by the trustees to David White had been duly surrendered and renewed and transferred to various persons. When this suit was brought and the company required to show the certificates "duly surrendered," it was found that what was called "duly" done was the issuance after death of David White of new certificates to parties holding the trustee certificates without the transfer the certificates on their face required, and the defendant's answer alleges as to sixteen of these trustee certificates (11) hereinafter called the "Sixteen."

---

*N.B.—There were two statements made for White's executor by the company, one June 22, 1843 (pages 47–48–49); the other statement (marked Exhibit B), made in 1854, has been bound in the Record between pages 48 and 49, and this might be confusing without this explanation.

"Said sixteen certificates were so endorsed and assigned in "blank, and this defendant is wholly ignorant as to whom the "same or any of them were so in fact assigned and delivered by "said Lipscomb, such endorsements in blank having been com- "mon as to said stock at that day, and always recognized and "acted upon by said company on being satisfied as to the genu- "ineness and authority of said signature. Said endorsements "frequently remained in blank and were delivered from hand to "hand in the course of business transactions and not filled up "with the name of any assignee or holder until it might so suit "the wishes of some holder thereof to insert his name as to the "transferee or assignee of said certificate."

The answer to the bill as to the other four Trustee Certificates standing in White's name at his death, is as follows:

"Certificate No. 10, out of book "C," bears on the back thereof "endorsement as follows: 'I assign the within certificate to "Ashbel Smith. David White, by Abner S. Lipscomb, att'y "in fact.' Witnesses, B. F. Tankersley, Geo. H. French.

"The endorsement and witnesses thereto on No. 28, book "C," "are precisely similar.

"The endorsement on No. 12, book "C," is similar: witnesses "thereto, William Little, B. F. Tankersley, Geo. H. French, and "another name, the second written, the surname of which is not "legible, or known to defendant.

"The endorsement on No. 27, book "C," is as follows: 'I "assign the within certificate to Levi Jones, David White, by "Abner S. Lipscomb, att'y in fact. Witnesses, B. F. Tankersley; "Geo. H. French.

"This defendant believes and therefore alleges from the appear- "ance of said endorsements of said certificates No. 10, 12, 27 "and 28 that each and all of them were originally endorsed, "transferred and delivered in blank by said Lipscomb, and that "after probably passing through various transferees and holders "thereof, the same, in due course of business and for value, "were received by the parties as shown in said endorsements, "and they were filled up and made special, as now appears.

"Said endorsements do not bear any date, but defendant be- "lieves and therefore alleges that each and all of said four cer- "tificates were endorsed, transferred and delivered by said Lips- "comb at a date anterior to the death of said David White.

"Defendant further says that the surrender of said certificates "to said Company, and the issuance of new certificates to parties "holding the same, did not take place until subsequent to the "alleged date of the death of said White, the said sixteen cer- "tificates were surrendered by and certificates in lieu thereof "issued to James Love, March 4, 1842; said certificate No. 27

" was surrendered by Levi Jones and certificate in lieu thereof " issued to him September 9, 1844, and said certificates Nos. 10, " 12 and 28, were surrendered to the Company by said Ashbel " Smith and certificates in lieu thereof were issued to him March " 5, 1845." (22).

POINT II.

The sixteen certificates were placed with Love, President of the company, by Lipscomb on March 4, 1842, and the company is liable for the sixteen because they permitted Love to have them transferred to his own name when he was not the owner and the certificates had not been assigned to him.

STATEMENT.

The company renewed these sixteen on March 4, 1842, to James Love (21 and 22) (40 and 41) (47 to 49) on his surrender of the sixteen trustee certificates therefor issued to David White. Said sixteen certificates are each as follows, except the book —— and No. ——:

"CITY OF GALVESTON IN ONE THOUSAND SHARES.

"The proprietors, M. B. Menard, Robert Triplett, Sterling " Neblett and William Fairfax Gray, conveyed to the under- " signed, as trustees, by their deed of the 15th of June, 1837, a " league and labor of land containing 4,605 acres, on the east " end of Galveston island, to be sold as joint stock in 1000 " shares.

"By the terms of said deed, certificates of shares when issued " are to be assigned by endorsement under hand and seal, in the " presence of two witnesses, before any justice of the peace or " notary public.

"The trustees, any two of whom may act, are to call a meet- " ing of the shareholders when deemed advisable.

"In the proceedings of the stockholders in general meeting " each share to be entitled to one vote, and to be represented in " person or by proxy, and a majority in interest to determine all " questions which may arise. The company may prescribe such " rules and regulations for its government and management, and " give such orders and directions to the trustees for the sale of

"lots, or any other purpose, as it may think promotive of the "general interest.

"CERTIFICATE OF STOCK. BOOK.....NO.....

"This is to certify that we, Levi Jones, William R. Johnson "and Thomas Green, trustees of the City of Galveston, in con- "sideration of.....do grant, bargain "and sell to David White, his heirs and assigns forever, one "share, No....., in the City of Galveston, to be holden and "enjoyed by him and his assigns upon the terms prescribed in "the deed bearing date the 15th of June, 1837, of M. B. "Menard, Robert Triplett, Sterling Neblett and William Fair- "fax Gray, constituting us the trustees, and in the agreement "entered into between us and the stockholders in said city, as "set forth in the proposal for subscription. Witness our hands "this 7th day of November, 1838. "LEVI JONES,

"THOMAS GREEN,

"*Trustees.*"

The endorsements on which the company issued new certificates to James Love, President, on March 4, 1842, are respectively as follows (62 to 65):

Book A, 116—Endorsed as follows: 1st July, 1841.
Levi Jones, Abner S. Lipscomb,
John P. Borden. att'y in fact for David White.
James Love.

Book A, 118—Endorsed as follows: 1st July, 1841.
Abner S. Lipscomb,
Levi Jones att'y in fact for David White.
John P. Borden. James Love.

Book A, 119—Endorsed as follows: 1st July, 1841.
Abner S. Lipscomb,
Levi Jones, att'y in fact for David White.
John P. Borden. James Love.

Book A, 120—Endorsed as follows: Abner S. Lipscomb,
Levi Jones, 1st July, 1841, att'y for D. White.
John P. Borden. James Love.

Book A, 121—Endorsed as follows: 1st July, 1841.
Abner S. Lipscomb,
Levi Jones, att'y in fact for David White.
John P. Borden. James Love.

Book A, 122—Endorsed as follows: 1st July, 1841.
Abner S. Lipscomb,
Levi Jones, att'y in fact for David White.
John P. Borden. James Love.

Book A, 124—Endorsed as follows: 1st July, 1841.
Abner S. Lipscomb,
Levi Jones, att'y in fact for David White.
John P. Borden. James Love.

Book C, 34—Endorsed as follows: 1st July, 1841.
Witness: Levi Jones, Abner S. Lipscomb.
John P. Borden. James Love.

Book C, 42—Endorsed as follows: 1st July, 1841.
Abner S. Lipscomb,
Levi Jones, att'y in fact for David White.
John P. Borden. James Love.

Book C, 43—Endorsed as follows: 1st July, 1841.
Abner S. Lipscomb,
Levi Jones, att'y in fact for David White.
John P. Borden. James Love.

Book C, 44—Endorsed as follows: 1st July, 1841.
Levi Jones, Abner S. Lipscomb, att'y in fact.
John P. Borden. James Love.

Book C, 45—Endorsed as follows: 1st July, 1841.
Abner S. Lipscomb,
Levi Jones, att'y in fact for D. White.
John P. Borden. James Love.

Book C, 46—Endorsed as follows: 1st July, 1841.
Abner S. Lipscomb,
Levi Jones, att'y in fact for David White.
John P. Borden. James Love.

Book C, 47—Endorsed as follows: 1st July, 1841.
Abner S. Lipscomb,
Levi Jones, att'y in fact for David White.
John P. Borden. James Love.

Book C, 48—Endorsed as follows: 1st July, 1841.
Abner S. Lipscomb,
Levi Jones, att'y in fact for D. White.
John P. Borden. James Love.

Book C, 49—Endorsed as follows: 1st July, 1841.

Levi Jones, Abner S. Lipscomb,
John P. Borden. att'y in fact for D. White.

From the receipt of Love to Lipscomb, and other papers, found among Lipscomb's papers, after his death, it appears that Lipscomb had not transferred the shares to Love and that Love held the shares to be returned when called for. (123, 110 and 111). There was also found among Lipscomb's papers a copy in Lipscomb's handwriting of a sale to Love of fourteen shares; this has no date, but was executed on or after March 4, 1842, as it gives the renewal numbers of fourteen shares renewed to Love on that day. The books of the Company show that on the 4th of March, 1842, the day of the date of Love's receipt to Lipscomb for the thirty shares Lipscomb transferred on the books of the Company to Love, renewal certificate 274 for eight shares, which certificate had been issued to Lipscomb on December 3, 1841, and of which three shares were represented by certificates then standing in White's name. When the transfer of this certificate was made on the 4th of March, 1842, on the books of the Company, Love, in place of the one certificate took eight certificates for one share each represented by numbers 286 to 293 inclusive; which are among the numbers designated in the sale from Lipscomb to Love; the other sixteen shares renewed to Love on the 4th of March, 1842, were evidenced at the time of renewal by sixteen trustee certificates isssued to David White, and are among those sued for. There was also found among Lipscomb's papers an order, in his handwriting, and signed by him, dated January 8, 1844, at his home, Walnut Bluff, (111, 123 and 248), near Hempstead, Texas, on James Love, in favor of R. J. Ware, executor of David White, for sixteen shares of the City Company stock, and a receipt in Lipscomb's handwriting for Ware to sign, but not signed, for twenty shares, four shares to be delivered at the execution of the receipt, and the other sixteen to be received from James Love on Lipscomb's order. These papers were as follows:

"WALNUT BLUFF, 9th January, 1844.

"DEAR SIR: Please deliver to Dr. Rob't J. Ware, executor
" of David White, sixteen shares of Galveston stock, and oblige
" your friend, ABNER S. LIPSCOMB.

"To Col. James Love."

"WALNUT BLUFF, TEXAS, January 9, 1844.

"Received of Abner S. Lipscomb four shares of Galveston
" City stock and an order on James Love, Esq., of Galveston,
" for sixteen shares more, which order, if paid, will make twenty
" shares of stock belonging to the estate of David White, de-
" ceased."

Now these papers clearly show that Love did not own the sixteen shares of stock, and that he got the certificates evidencing them from Lipscomb on March 4, 1842, nearly three months after White's death, and the date of July 1, 1841, on the back of each of said sixteen certificates, whether put there before or after the stock was received by Love, was not the date it was put in his hands by Lipscomb.

Whether Lipscomb left these shares with Love merely for safekeeping, or to be voted by Love, who was then president, we can now never know; but it is in evidence that Love died in 1874, and before his death the company knew of this receipt outstanding against them, and took his written statement to the effect that his holding these shares was a private matter between Lipscomb and himself, and that he did not hold them in his official capacity as president of the company. This was done at the suggestion of the attorney for the company (248).

This statement by Love clearly confirms Lipscomb's memoranda of January 7, 1844, showing that the sixteen shares belonged to White's estate at that date as Love made no claim of ownership.

The answer admits that sixteen of the trustee certificates issued to David White and standing in his name, were renewed some three months after his death to James Love. The evidence shows that Love was at the time the president of the company; the company has nothing to show as to this action on its part, as against the plaintiff's, except the certificates themselves; nine of these sixteen certificates have on the back of each as follows (56 to 65):

1st July, 1841.
ABNER S. LIPSCOMB,
Attorney in fact for David White.
JAMES LOVE.

LEVI JONES,
JOHN P. BORDEN.

Four others of these sixteen certificates have exactly the same on the back of each, except that White's name is written D. White instead of David. One of the others of the sixteen has the same as the copy above given, written on it, except that Lipscomb's name has attorney in fact written after it without stating who for, and another has simply Abner S. Lipscomb; with these differences, the writing on the back of each is the same. The answer alleges that the signatures of Jones and Borden are as witnesses to Lipscomb's, but the appearance of the signatures and the relative positions would rather indicate that they were witnesses to the signature of Love, and the fact that

they appear on all sixteen of the certificates and the signature of Love and the witnesses are on all, and in same relative position, and the signatures of Lipscomb vary so much as to indicate that they were not put on the whole of the sixteen certificates at the same time, would confirm this opinion.

Neither the estate nor heirs of David White received anything for the sixteen shares (43, 151-2).

ARGUMENT UNDER POINTS I AND II.

The plaintiffs seek recovery on the ground that as owners of stock in the company, the defendant, they have been injured by its refusal to recognize them and by reason of cancellation of certificates of stock and issuance of new certificates to parties not owning the shares. The plaintiffs claim that the company took up the shares without any transfer that passed title and legal right and title of plaintiffs is in and to the shares.

The plaintiffs sue as the heirs of David White, deceased. White was the owner at one time of sixty-seven shares of the stock of company represented by sixty-seven certificates, issued to him, for one share each. The company was at the time (June, 1838) a joint stock partnership, whose capital was the league and labor of land the City of Galveston is on. This land was for sale in town lots. The land was deeded to three trustees and the instrument creating the trust provided for the issuance of certificates of stock by these trustees, and instead of transfers being on the books of the company it was expressly stipulated, in the instrument and contract of trust, that the transfers were to be in writing and before a justice of the peace or notary public.

On February 5, 1841, the Galveston City Company was duly incorporated by the Republic of Texas, and the company then opened stock books and certificates in usual form and provisions for transfer on the books, and requested the owners of trustee certificates to exchange them for the new ones. As sale for stock was dull, the corporation allowed owners to cancel and take lots, at market value, for stock.

On April 8, 1839, David White gave Abner S. Lipscomb, of Texas, power of attorney to sell and transfer his stock. White lived in Alabama, and died December 10, 1841.

White's executor, in the spring of 1843, having failed to ascertain the status of the stock and other Texas interests of the estate, sent Clement C. Billingslea to Texas, as his agent, to get at the facts. Lipscomb was not at home, and as the next best source of information Billingslea applied to Gail Borden, the then agent and secretary in charge of the office and affairs of the city company, for the facts as to the White stock. On June 22, 1843, Gail Borden wrote that he inclosed a statement, being a transcript from the stock register. (47.) This represented all the White stock, and showed book and number of certificate issued by trustees, date of issuance, by whom surrendered, and whether it had been canceled for lots bought or renewed in certificates of the corporation, giving numbers of these renewed certificates. In summarizing, he stated that sixty-three of the original shares issued by the trustees to White had either been canceled for lots or renewed, and as to four shares, that the original trustee certificates had not been surrendered to the corporation. He further stated that this is a correct statement from the books, and that White did not own any of the renewed stock. That "the business has been done by Judge Lipscomb by power of attorney from D. White."

Accepting the books as correct, and that the stock had been all but four shares disposed of under the power, nothing was open for inquiry except as to the status of the four shares.

The representatives of White's estate could not get any satisfaction, or statement from Lipscomb, as to the stock and other matters of David White. Finally the executor of White's estate went to Texas to try and get statement and close matters. He was to have met Lipscomb early in January, 1844, but was prevented, by high water, from crossing the Trinity river, and was called back to Alabama without seeing Lipscomb.

Lipscomb died in December, 1857 (207). Many years after his death lawyers, representing the heirs of White in another matter, had occasion to examine papers of Abner S. Lipscomb, (244, 247, 248, 108 to 111), and among them was found the following in Lipscomb's own hand:

"STATEMENT OF AN ACCOUNT OF GALVESTON STOCK BELONG-
" ING TO ESTATE OF DAVID WHITE AND MYSELF, ETC.:

"Sixteen shares sold for lots in the town of Galveston, for half
" league of land on the waters of the Neches; the title all in my
" name, but the estate of Mr. White jointly interested with me.
"Five shares sold for the tenth of John Wharton's headright
" league at Velasco; title not yet completed.

"Five shares sold for twenty shares of the league and labor
"at Edwards' Point; certificates in my own name.
136 "Received sixty-two shares in all—I was jointly interes-
"ted in fifty-six of them—leaving on hand for the estate
"of D. White twenty-one shares (21). I advanced to D. White
"five thousand dollars, part payment of the draft in favor of T.
"J. Green. One thousand dollars was paid in Mobile to me by
"D. White and two thousand dollars has been paid Michael B.
"Menard, leaving two thousand unpaid. It was all to have been
"out of the money coming from Menard to White.
[Signed] "ABNER S. LIPSCOMB.
"8th January, 1844.

"I have received this day from A. S. Lipscomb, thirty-one
"shares of Galveston City stock, which I promise to return to
"him whenever thereunto requested, value received. March 4,
"1842. [Signed] "JAMES LOVE."

Also a paper, purporting to be a copy, undated, as follows:
"For value received, I do hereby assign unto James Love all
"my right, title and interest in, and to, fourteen (14) shares of
"the stock of the City of Galveston, Texas, on which has been
"paid by one thousand dollars on each share.
"ABNER S. LIPSCOMB."
"*Witness:* JOHN P. BORDEN." (Nos. 280 to 293.)

Also, a written order in handwriting of Abner S. Lipscomb, and signed by him, as follows:

"WALNUT BLUFF, January 9, 1844.
"DEAR SIR: Please deliver to Dr. Rob't J. Ware, executor of
"David White, sixteen shares of Galveston stock, and oblige
"your friend, "ABNER S. LIPSCOMB.
"To Col. James Love."

Lipscomb lived at Walnut Bluff, Texas (210,) and the date corresponds with the time he expected to see executor of White and these papers were, no doubt, prepared with a view of a settlement.

James Love, however, had transfered the stock and had become insolvent and subsequent letters (121) from Lipscomb to White's executor show that he abandoned all intention of admitting his liability to White's estate or of letting them know that James Love had used sixteen shares that belonged to the estate.

The receipt from Love to Lipscomb for thirty shares, the sale from Lipscomb to Love of fourteen, which Lipscomb owned, the order prepared by Lipscomb on Love for delivery to R. J. Ware, executor of David White, of the other sixteen shares; all these papers clearly show that Love did not own the sixteen shares of stock, and that he got the certificates evidencing them from Lipscomb on March 4, 1842, nearly three months after White's death, and the date of July 1, 1841, on the back of each of said sixteen certificates, whether put there before or after the stock was received by Love, was not the date it was put in his hands by Lipscomb.

Whether Lipscomb left these shares with Love merely for safe keeping, or to be voted by Love, who was then president, we can now never know; but it is in evidence that Love died in 1874, and before his death the company knew of this receipt outstanding against them, and took his written statement to the effect that his holding these shares was a private matter between Lipscomb and himself, and that he did not hold them in his official capacity as president of the company (183). This was done at the suggestion of the attorney for the company.

This statement by Love clearly confirms Lipscomb's memoranda of January 7, 1844, showing that the sixteen shares belonged to White's estate at that date as Love made no claim of ownership in this statement.

The answer admits that these sixteen of the trustee certificates issued to David White and standing in his name were renewed some three months after his death to James Love. The evidence shows that Love was at the time the president of the company. The company has nothing to show as to this action on its part, as against the plaintiffs, except the certificates themselves. Nine of these sixteen certificates have on the back of each as follows:

1st July, 1841.
ABNER S. LIPSCOMB,
Attorney in fact for David White.
JAMES LOVE.

LEVI JONES,
JOHN P. BORDEN,

Four others of these sixteen certificates have exactly the same on the back of each, except that White's name is written D. White, instead of David. One of the others of the sixteen has the same as the copy above given written on it, except that Lipscomb's name has attorney in fact written after it, without stating who for, and another has simply Abner S. Lipscomb. With these differences, the writing on the back of each is the

same. The answer alleges that the signatures of Jones and Borden are as witness to Lipscomb's, but the appearance of the signatures and the relative positions would rather indicate that they were witnesses to the signature of Love, and the fact they appear on all sixteen of the certificates, and the signature of Love and the witnesses on all sixteen are in the same relative position, and the signatures of Lipscomb vary so much as to indicate that they were not made on all at the same time, would confirm the opinion.

The facts being that David White, a resident of Alabama, held certificates issued before the company was incorporated, and which, by the instrument of trust under which they were issued and the terms of the certificates, were not transferable except before a notary or justice of the peace. That he placed these certificates in Texas with A. S. Lipscomb and gave him power of attorney to sell. That after the death of White the company recognized the holders of these twenty-three certificates as being the owners without any formal transfer, and the company took up these twenty-three certificates and issued those of the corporation to the parties presenting these trustee certificates and afterward canceled these in payment for lots. That the president of the company, James Love, presented sixteen of these twenty-three David White certificates, and he did not own them. That as to four others of these twenty-three certificates the company issued the corporation certificates after they were advised that the executor of White desired to know how they stood and whether the estate of White had any interest in them.

This brings us to the law of the case—to the point on which the case hinges.

The liability of the company on these facts to the owners of the shares, the heirs of David White. The legal title of the certificates did not pass. The company represented that transfers had been duly made of the David White certificates by his attorney in fact (48, 49). The real fact was the company recognized the holders of these certificates as owners without any transfer.

The law books speak of certificates of corporations as quasi negotiable. These trustee certificates by contract, between the owners of the land, that authorized their issuance, were not to be transferable on books of the company, but each joint tenant in the land had his interest represented by what they called stock certificates and the title it represented could be passed in the way prescribed for protection of the owner and in no other, and even

when the prescribed form of transfer was made the law as to non-negotiable instruments applies.

The leading cases in the United States Supreme Court as to the title not passing by unauthorized transfer of a non-negotiable instrument, is, by a singular coincidence, where this same James Love (241) sold non-negotiable certificates of the Texas republic, left in his hands by Combs, who had endorsed them in blank. Combs vs. Hodge, 21 How. 407, Hodge vs. Combs, 1 Black 192, and the first case in Texas on same point is the opinion written by Abner S. Lipscomb in Menard vs. Shaw, 5 Texas, 338.

In Combs vs. Hodge the question of rights of a payee, the owner of a non-negotiable instrument and as to what must be shown as a defense to suit for its recovery was fully argued by Mr. Reverdy Johnson for the one side and Mr. Bradley for the other, and is a leading case directly in point with that at bar and very similar in many features, and the court is respectfully asked to consider it.

On the second appeal, Hodge vs. Combs, the court held that on first appeal the case had been reversed to allow the holder to show: First, sufficient power to the agent to convey, and, *second, payment of bona fide consideration.*

In case at bar there was no formal execution of transfer by the attorney in fact and no consideration paid, and in fact no sale made by the attorney in fact.

Lipscomb left sixteen of the certificates with James Love, president of the company, with name of White signed by Lipscomb, on back of fourteen of them, the other two with only Lipscomb's name on them. The company canceled the certificates for lots without any evidence of sale to Love or payment by him, and the company acted as no prudent man would in accepting Love as the owner. Love was not the owner. Under Combs vs. Hodge title to the shares remains in the heirs of David White.

This law principle has been fully and frequently applied to transfer of certificates of stock even of incorporated companies and when no special limitations on transfers had been made as by the unincorporated company, who issued and prescribed manner of transfers of the certificates of the Galveston City Company.

Lowell on Transfer of Stock, §§143-4-6-9 and 13.

The company have taken up certificates evidencing interest in land belonging to White's estate, and these certificates show

the legal title had not passed, and the facts are that certainly as to sixteen, the holder was simply a holder for the owner, and had no interest in as well as no title to the shares.

The company not only took up these certificates and issued others to the holder, but afterwards bought from the holder, and now says the heirs of White have no right, because the holder was the owner as a matter of fact, and the certificates had, as matter of law, been duly transferred to, and put the title to the shares in the holder.

The evidence shows the company has failed to show the holders were the owners by technical transfer, or paid consideration, and as to the certificates having been duly transferred as matter of law, there is nothing that even purports transfer unless signature in blank by attorney in fact, recognized after death of the maker, can be so called.

The case of Combs vs. Hodge decides that a holder of non-negotiable paper as against original payee must show good faith, which, it says, covers reasonable prudence and valuable consideration.

In case at bar James Love was a naked holder of the non-negotiable certificates. The Galveston City Company was trustee for and custodian of the rights of the owner, the estate of White. If the certificates were in the hands of James Love the case would be identical with that of Combs vs. Hodge. The corporation, the City Company, was custodian of its stock books containing corporation certificates, which it was their duty to deliver to the owner of the certificates issued by the trustees to David White. The president, James Love, has the renewal certificates issued to him on surrender of the non-negotiable certificates without any proof of ownership or value paid. Love did not have title, legal, if he was equitably entitled to the share the company did not inquire. It was the duty of the company to have inquired. White was dead when Love presented the certificates. Lipscomb was within reach. (50.)

The company afterward canceled seven of the certificates still in the hands of Love for lots. The last of these were four certificates canceled by Love April 27, 1854. Two of the others were canceled in 1845, the seventh in 1849 (48 to 49).

The corporation did not take any statement of Love as the transaction of the sixteen shares until just before his death in

1874; and then only to ask whether he held the sixteen certificates for Lipscomb officially as president or as an individual.

The company canceled and gave lots to Love for the seven long after the inquiry by White's estate as to status of the stock and reply by the company giving assurance that they had duly passed under the power of attorney (48 to 49).

Is the corporation in any better position in this suit than James Love would have been?

Does not the company rather stand in a worse attitude? There was no trust relation between the owner of the shares and Love as an individual. The corporation was custodian of the certificates held by it for the owner on surrender by the owner of the trustee certification that named David White as owner.

The company now claims that it can not deliver these trustee certificates held by it because they gave James Love renewal certificates and then gave him lots for these.

The Supreme Court held "the officers of the company are custodians of its stock books and it is their duty to see that transfers are properly made, and if transfer is made to one having no title, even though they have exercised the utmost prudence, the company is liable; that it is an essential to peace of society that no one can be deprived of his property without his consent except by process of law." Telegraph Co. vs. Davenport, 97 U. S., 371-2, and authorities referred to by the court in note, p. 373.

To the same effect the Supreme Court of Texas held that a company is the custodian of the rights of its stockholders and responsible for illegal issuance of stock to their prejudice. Strange vs. C. & T. R. R., 53 Texas, 168, and cases cited.

Baker vs. Wasson, 53 Texas, 150-156; also Baker vs. Wasson, 59 Texas, 145.

This same case holds that ordinary provision on face of certificate for transfer on books of company is for the protection of the company in matter of dividends, voting, etc., but the opinion recognized the difference where the provision is by charter or statute.

In the case at bar the formalities were very unusual and prescribed by the deed of trust, by and under which the stock was authorized and issued and the certificates not only set out the formalities of the transfer, but stated that they were required by the deed of trust.

The terms of the deed of trust was a partnership agreement between those who owned the land and authorized the formation of the unincorporated joint stock company by and under the trust deed.

Clagett vs. Kilbourn, 1 Black., 349.

Three trustee certificates were issued to represent the ownership of the land, or strictly speaking, the interest in the proceeds of the land as from time to time sold, in town lots, and the deed of trust did not provide for any transfers by the company of the certificates or the keeping of any transfer books.

In lieu of this protection the owner of a share would have, if the officers of the company had to make the transfers, formalities, stated in the trust deed and certificate, were agreed on to the end that the owner should be fully protected as against loss or conversion of the certificates. Now, can it be said that the company is not liable, when the carefully prepared restrictions were disregarded? When the company afterwards decided to issue in lieu of their expressly non-negotiable certificates a certificate quasi negotiable in usual form; the company not only made the transfer of the shares in disregard of the provisions of the deed of trust, but it afterwards bought up the certificates so illegally issued.

The company stands exactly as if it had in the first instance bought the sixteen trustee certificates from James Love instead of giving him new certificates and then buying those. The shares were not touched by the action of the company and the ownership remained in the estate of David White. The paper, the certificate, had been marked canceled by the company, but White's estate had the right to require the company to issue a new certificate or deliver the old with cancellation revoked.

In the case of seven of these sixteen certificates the company bought directly from Love (Exhibit B, between pp. 48 and 49), but in our view it matters not how many hands certificates or renewals of certificates passed through the share was not touched as between White's estate and the company, who had attempted to transfer when it had no power and tried to put the shares in Love's name, who was not the owner.

The company recognized the act of Lipscomb as only valid when exercised under his power of attorney to sell. There was no sale by Lipscomb of sixteen of the shares and nothing that purported to be. (Exhibit B, between pp. 48 and 49 and 229.)

As to three of the others Lipscomb transferred them from name of White to his own name with the sanction of the company, and as to the other four, there was a transfer by Lipscomb but it was not formal, and the company recognized it years after White's death, and the memorandum left by Lipscomb shows he had not sold these four at the time he expected to meet the executor of White, but he expected to turn over these four to him.

POINT III.

The three shares Smith transferred March 5, 1843, and one Jones transferred September 9, 1884, belonged to the heirs of White.

Among the memoranda Lipscomb had prepared, and in his own handwriting and ready for signature but not signed (he expecting to meet Ware, the executor of White's estate, and make a settlement), is the following:

"WALNUT BLUFF, Texas, Jan. 9, 1844.

"Received of Abner S. Lipscomb four shares of Galveston City "stock and an order on James Love, Esq., of Galveston, for "sixteen shares more, which order, if paid, will make twenty "shares of stock belonging to the estate of David White, de- "ceased."

By an accident Lipscomb and Ware never met, and this and other memoranda was found among Lipscomb's papers after his death. (180.)

This receipt evidently refers to four shares then evidenced by trustee certificates, as the renewed or new form certificates could not be transferred except by the party transferring indorsing the transfer on the books of the company.

At date of this receipt there were only four of trustee certificates originally issued to White still outstanding (Exhibit B, between pp. 48 and 49), of which one (book C, No. 27), was renewed to Levi Jones (22–41), without any transfer to him on September 9, 1844. Of the renewal of this certificate and the facts connected therewith the only evidence is the certificate taken up by the company and the date of the issuance of the renewal.

The original certificate is indorsed as follows:

I assign the within certificate to Levi Jones.
DAVID WHITE,
Per Abner S. Lipscomb, attorney in fact.
Witnesses: B. F. Tankersley, George H. French.

The three shares (numbers 10, 12 and 28, book C) Smith got have very similar indorsements, except that the note of surrender is put on them and signed by Smith and Smith's name in the indorsement to him in his own handwriting (160). Smith had no recollection of the facts as to his ownership of these shares (161). He thought at first he got them from Hunt (p. 37, exhibit 2, of defendants answer,) and afterwards he thought he sold them to Hunt (160-161). He testifies that he did not own them or have any interest in them after 1843, but the company's books show renewals were issued to him March 5, 1845, and they stood in his name till May, 1847, when he executed a formal power of attorney to A. F. James to transfer them, and they were so transferred June 9, 1847 (93, exhibit 13, between pp. 48-49).

So in January, 1844, it appears that Lipscomb had in his hands the three certificates Smith surrendered March 5, 1845, and the one Jones surrendered September 9, 1844, because there was no other four trustee certificates outstanding, and which he could have then held, to deliver to Ware, executor of estate of White (180).

The testimony of Smith shows he had no independent recollection of the facts connected with the three David White certificates renewed to him more than three years after the death of David White and then sold by Smith. Before he testified he wrote to the attorney for the company, in June, 1882 (37), that he thought he got three shares from Memican Hunt. On the witness stand he could not say he had any recollection of these particular certificates, or any others (159-160). He testified that the words "I assign the within certificate to Ashbel Smith," on No. 12, was written by him—the indorsement is as follows:

Book C, 12—Indorsed as follows: I asssign the within certificate to Ashbel Smith. David White,
per Abner S. Lipscomb, att'y in fact.
Witness: William Little, P. J. Latham, B. F. Tankersley, Geo. H. French.
Surrendered for new stock 5th March, 1845.
Ashbel Smith.
Witness: G. Borden, Jr., Agent.

The transfers on the other three of said four White certificates are as follows:

Book C, 10—Indorsed as follows: I assign the within certificate to Ashbel Smith. David White,
per Abner S. Lipscomb, att'y in fact.
Witness: B. F. Tankersley, Geo. H. French.
Surrendered for new stock 5th March, 1845.
Ashbel Smith.

Book C, 28—Indorsed as follows: I assign the within certificate to Ashbel Smith. David White,
per Abner S. Lipscomb, att'y in fact.
Witness: B. F. Tankersley, Geo. H. French.
Surrendered for new stock, 5th March, 1845.
Ashbel Smith.
Witness: G. Borden, Jr.

Book C, 27—Indorsed as follows: I assign the within certificate to Levi Jones. David White,
per Abner S. Lipscomb, att'y in fact.
Witness: B. F. Tankersley, Geo. H. French.

On Smith's recollection having been refreshed by his signature to the transfer on books of the company of the corporation certificates he got on March 5, 1845, in place of the three David White certificates, he still had no recollection of the facts other than what the books show (164). He also identified his signature to power of attorney given James (164 and 93). That power of attorney is as follows (93):

"58.

"STATE OF TEXAS, }
"*County of Harris.* } *ss.*

"Know all men by these presents that I, Ashbel Smith, of said "county, have constituted and appoint A. F. James, of the county "of Galveston, my attorney, to transfer on the books of the Gal- "veston City Company three shares of stock, numbers 471, 472 and "473, and I hereby ratify and acknowledge said transfer as mine, "as though done by me in person.

"Given under my hand and scroll for seal this fifteenth day of "May, 1847. ASHBEL SMITH. [Seal.]

"Witness: JOHN H. WALTON."

Smith testified that he thought he bought the three certificates in 1840 and sold them the same year, but he admitted he had no independent recollection of any facts as to them, or whether he

had owned other certificates. His testimony shows great infirmity of or want of memory, if a man could be expected to recollect such facts after 40 years.

Smith testifies he never owed any man anything, and on his memory being refreshened, had to admit two mortgages given on the only real estate owned by him in Galveston, and could not say he had paid them (163 and 164). He thought he transferred the three certificates to Memican Hunt before July, 1840 (160). The books of the company show that Smith surrendered these three David White trustee certificates Nos. 10, 12 and 28, Book C, on March 5, 1845, and got in place of them three certificates from the corporation in his own name, Nos. 471, 472 and 473, respectively (exhibit B, between pages 48 and 49), and more than two years after, on May 15, 1847, he executed power of attorney to James to transfer these shares on books of the company, and transfer of them was made June 9, 1847, to John M. Jones on the books of the company (exhibit B, between pp. 48 and 49).

These three trustee certificates issued to David White, Nos. 10, 12 and 28, Book C, and the one 27, Book C, were the only four of the David White certificates in possession. or that could have been in possession of Abner S. Lipscomb when he prepared receipt January 9, 1844, to be signed by executor of David White, whom he was expecting to come to him to get a settlement of the David White matters (123). The papers prepared for that settlement are as follows:

"WALNUT BLUFF, 9th January, 1844.

"DEAR SIR: Please deliver to Rob't J. Ware, executor of "David White, sixteen shares of Galveston stock, and oblige "your friend, ABNER S. LIPSCOMB.

"To Col. James Love."

"WALNUT BLUFF, TEXAS, January 9, 1844.

"Received of Abner S. Lipscomb four shares of Galveston "City stock and an order on James Love, Esq., of Galveston, "for sixteen shares more, which order, if paid, will make twenty "shares of stock belonging to the estate of David White, de-"ceased."

The estate of David White never received anything for the stock sued for. Robert J. Ware testified (146): "I am the grand-" son of David White, deceased. Robert J. Ware, my father, ad-" ministered on the estate of David White. Neither the estate " nor heirs of David white, nor the representatives thereof, have " ever realized anything whatever from proceeds of sales or " transfers of shares of stock for which this suit is brought."

Thos. J. Molton testified (113) "From intimate acquaintance "with the current facts for many years and careful investiga- "tions of and familiarity with all the papers and matters of "David White's estate, I can say now most positively that the "sixteen shares, numbers 116, 118, 119, 120, 121, 122 and 124 in "Book A, and 34, 42, 43, 44, 45, 46, 47, 48 and 49, in Book C, "which the company allowed James Love, its then president, to "use, and the four Ashbel Smith was permitted to use, numbers "31, 32, 40 and 41, in Book C, and the one, number 27, in Book "C, it suffered Levi Jones, its once president, to use, were rec- "ognized by the company as having been transferred as against "White's estates and heirs when there has been no legal transfer, "and neither the estate nor heirs have ever gotten any consider- "ation therefor, directly or indirectly, and when, if there was "any honesty or integrity in Abner S. Lipscomb, he considered "them the property of the estate of David White, and so pro- "nounced them long after the said White died, and Lipscomb's "memorandum or statement of January 9, 1844, shows that if "the company had made inquiry it would have found that the "shares had not been sold by him."

POINT IV.

There has been no laches, under the facts, in the bringing of this suit.

The defendant lays great stress on defense of stale demand and laches, repeating this, as a defense, several times in the answer. The court below held, without any formal delivery of opinion, that the claim could not now be prosecuted by reason of laches of plaintiffs.

The evidence shows not only that there has been no neglect as to the pursuit of the rights, but that there has been more than ordinary diligence. Twenty-three of the twenty-four shares of stock sued for all stood at White's death (57) in his name on the books of the company, and the only power of attorney to sell them was in the hands of A. S. Lipscomb, whose character is eulogized by the answer of the company.

R. J. Ware qualified in Alabama as executor of White's estate within a very short time after White's death. About a year thereafter he employed a reliable and competent agent and sent him to Texas to see after the interest of the estate. Lipscomb

promised to meet this agent at Galveston to give a statement of the matters in hand, but failed to be there. This agent then did the next best thing that a diligent and prudent agent would and could do. He applied direct to the agent of the Galveston City Company, in whom he had personal confidence and whose character and general reputation the defendants say in their answer and evidence was good, and he is furnished with a statement by the agent of the company to the effect that sixty-seven shares had been issued to White and that all but four certificates evidencing four shares had been taken up and renewal certificates issued to others; that none of the renewals were to White; that the business had been done by Lipscomb under power of attorney from White; that there were still outstanding four shares (49). (See Exhibit A, p. 47.)

From this statement there was nothing to put the inquirer upon any notice of any rights of White's estate as against the City Company. The statement gave as a transcript from the books of the company the numbers of 63 of the 67 shares and a statement of who surrendered the original certificates and got renewals, and apparently it was a full and fair showing that Lipscomb had duly transferred these sixty-three shares, and as to the other four the company could not answer, because the trustee certificates therefor were still outstanding, and the certificates could by their terms be assigned by transfer before two witnesses and in the presence of a justice of the peace or notary without the company having anything to do with, or knowledge of, the transfer, so that as to the four outstanding they could not say but that White in person, or by his attorney in fact, Lipscomb, had disposed of them.

Was there any want of diligence in the representatives of White taking the statement of the company as true and resting on the facts as reported to them?

When we consider the character and standing of the attorney in fact (18, 39, 58, 190) and the agent of the company, who could have been supposed to demand more? Who would have suspected that the true facts were that sixteen of the certificates taken up by the company after White's death and renewals issued in lieu thereof to James Love had in fact never been transferred to the holder in the way that the owner had the right to believe would be required by the company for his protection, and in fact had never been transferred to Love at all, but that they had been left with him, the (holder) by the attorney in fact to be returned when called for, and the company had recognized the holder as the owner without any evidence or inquiry as to whether or not he had any right to have renewal certificates issued to him.

With nothing to put on further inquiry, can the company be heard now to say that there has been laches because the statement was relied on and the representatives of White's estate did not discredit the showing the company made them? This was in June, 1843. The company was again applied to for further information, and in December, 1854, the company, by its present agent (J. P. Cole, a lawyer of character and standing), made and delivered to the estate of White what he called "Historical statement of Galveston City stock originally issued to David White" (exhibit B, between pp. 48 and 49), which purported to give the history of each and every certificate issued to White and to which Cole, the agent of the company, attached his certificate "that all the White stock has been duly surrendered, renewed and transferred to various persons and finally canceled except six shares." That is, he certified that all had been bought in by the company, for property given for them by the company, and canceled by the company, who took them under due and regular transfer from and under David White, except six shares transferred to third parties and still outstanding. Three years after the company closed its books against the inspection of even its recognized stockholders (83, 84, 85, 86, 87), and the true facts were never known, till the answer in this suit disclosed that the company renewed sixteen certificates to James Love after White's death, and with no transfer to Love, and without ascertaining or inquiring whether Love, then a director in and president of the company, had any right, title or interest in or to the shares, for which he had nothing to show to the company but the naked possession of the certificates (106 to 112). We show by the admission of A. S. Lipscomb, in writing, found after his death (he died in 1856) among his papers, that in 1844 he drew an order on James Love to deliver the sixteen certificates to the executor of White's estate as the property of White; we are now told by the company that the demand on them for the shares they bought under the said Love, as naked holder, and allowed to be transferred, or rather themselves renewed, in fraud of the rights of White's estate, and in disregard of the terms of the certificates, is stale, and the plaintiffs have slept on their rights. That when its agent, a good lawyer, and a man of standing, certified for the company that the shares had been duly transferred, he did not mean that they had been transferred according to the terms and requirements of the certificates that evidenced the sixteen shares, but that the agent of the company frequently recognized the holder of the certificate as owner without transfer (40). That when the attorney in fact got from the company three new certificates in his own name, on the surrender of three standing in his principal's name, a few days before his principal's death in Alabama. When the company issued, without transfer and without any date to informal signature on certificate,

to Jones and Smith in 1844 and 1845, renewal certificates for four shares, the very shares the previous agent of the company had been asked about in June, 1843, and could not answer, because he did not know but that the trustee certificate for them had been duly transferred, now the company says the agent simply meant by duly transferred, as to these shares, that in his judgment it was duly done, because done by the company, although in disregard of the terms of the certificates and of the fact of White's death. If these certificates can be said, by this court to have been duly transferred, as against David White's estate, then that ends the case, and the plaintiffs have no rights; but if there has been no transfer of the certificates in the contemplation of law, and Lipscomb is to be believed, when he made a written statement and left it with his papers, that in 1844 Love ought to have held sixteen shares left in his keeping, and belonging to estate of David White, and the evidence not only does not show any estoppels on plaintiffs, but to the contrary shows that the estate never got any benefit or advantage, or consideration of any kind for the shares. Then how can laches affect the rights of plaintiffs to recover, when the delay is owing to the undertaking of the company to pass on the validity of transfers, for itself, and certified to a legal conclusion as a fact, when it was not true as fact, and they did not disclose the facts for plaintiffs to act on.

We should like to believe that the company believed the correctness of the statement made by the agent to the representative of White's estate, but the facts do not show such was the case; to the contrary, the evidence shows that when the representatives of White's estate wanted to verify, in abundance of caution, the certified statement of agent as made in 1854 and applied to the company for leave to do so, that then it was that the company, by formal action of its directory, closed its books and refused to permit the verification (47, 82 to 87). But this is not all. It appears from the evidence that the company did not take this action merely because it did not want the trouble of verifying, but the closing of its books was after the directors had the transfers of the White stock carefully looked into by a committee of directors, one of whom at least (Goddard) was a good lawyer. (183, 221.)

The evidence discloses that for some time after the closing of the books there were negotiations pending and efforts made by the representatives of White's estate to verify the correctness of the statement of the company that the certificates had been duly transferred (106 to 125.) Then the war came on, the executor died, and there was necessary delay in getting an administrator appointed. This administrator, appointed in 1869, gave personal

attention to the matter, visited Texas, consulted lawyers, having become advised of the memoranda of Lipscomb throwing a suspicion on the statement of the company that all the certificates had been duly transferred, when Lipscomb said Love held sixteen and he himself four, three years after White's death.

In pursuit of the rights of the estate the administrator made demand in 1869 on the company to see the transfer which, under its policy and management, as appears in the evidence, was never even referred to the directory (87, 52). He consulted lawyers of reputation, and was told that the stay law and other legal reasons prevented there being any prejudice to there rights by delay, and that there was a pending suit against the company so similar that it was best to wait its decision. After a delay waiting for this decision and correspondence of several years, showing diligent effort on part of the administrator, a final opinion was given against the right of a suit. This opinion was by the counsel who then and now represents the corporation, and who pleads laches and stale demand by reason of the delay while he had the case under advisement, and when he did not then think that the delay would prejudice the plaintiffs (109, 251, 255, 256, 261, 262, 264, 266, 268).

Finally employing other counsel (111) who had got at some of the inner workings of the company in a suit against it, the representatives of the estate and the heirs are advised to allege matters of inference from known facts as disclosed by Lipscomb's memoranda as to twenty shares being the facts, the evidence of their being facts being solely in the possession of the company, and to sue. This suit is brought and defense is that the demand is stale because plaintiffs rested on a certified formal statement of the company to matters as facts when they were not the facts, and though the whole matter is one of record in books of the company and is as full and perfect to-day as it was when the false statement was made, the company claims the shares of which it was the custodian for plaintiff's ancestor, White.

After the company's refusal in 1869 to show the transfers of the sixteen certificates and others issued originally to White, the company recognizing that Love was not the owner of the sixteen shares, the company changed from the name of White to Love, took Love's affidavit that he did not hold the sixteen certificates as president but as an individual (248).

Constitution of 1870 suspended limitation from January 28, 1861, to March 30, 1870, and Judge Ballinger wrote Molton in

1869 and afterwards that delay would not affect plaintiff's rights (251 to 273).

AUTHORITIES.

Oliver et al. vs. Piatt, 3 How. (U. S.) 411.
Bayard vs. Farmers' Bank, 52 Penn. St. 235.
Telegraph Company vs. Davenport, 97 U. S., 371-372.
Meader vs. Norton, 11 Wallace, 458.
Bailey vs. Glover, 21 Wallace, 342, 347, 348, 349.
Michaud et al. vs. Girod et al., 4 Howard, U. S. 561.
Sears vs. Eastburn, 10 How., 187.
Galt vs. Galloway, 4 Peters, 436.
Law Rep., 3 H. L., 275.
Ormsby vs. Copper Min. Co., 56 N. Y., 623.

ARGUMENT.

We do not think that as between the company and the owner of shares the unauthorized issuance to one not the owner of certificates cuts any figure or starts any statute of limitation or sets time in motion for a plea of stale demand.

But if time would run, when did it commence in this case? The formal certificate of the company over signature of its secretary in 1854, that the shares had all been transferred and this agent a man of character, and a lawyer of ability.

The subsequent examination for the company of the so-called transfers by Goddard, Hartley (p. 148), Ballinger (p. 215), all lawyers of ability, make it reasonably certain that the company, carefully considered the facts, evidenced by the blank signatures on the back of the trustee certificates.

The agent, in 1854, certified as matter of fact the company's conclusion of law that there had been due transfers made by the certificates. This conclusion by the company was given to the representatives of White's estate as being a fact, and the company, after having the certificates examined, reiterates this. White's executor was not allowed to see the trustee certificates held by the company and said to be duly transferred.

Now, the best that can be said for the company is that under a mistake of the law it certified its conclusions of law to the owners of the shares as being a fact, otherwise the action of the company amounts to actual and premeditated fraud and carefully concealed evidence of fraud.

But the company still, by its answer in this suit and by the evidence of its officer who made the certificate of duly trans-

ferred, says that the sixteen certificates renewed to Love, and the three to Smith, and one to Jones, and three to attorney in fact Lipscomb, were each and all duly transferred.

How, then, can the company plead laches as a defense? If the certificates were duly transferred so as to carry the legal title, then whether Love, Smith and Jones owned the shares matters not, and White's estate only had an equity. Then it would be useless to go further.

But the company sets up lapse of time as its main defense in confession and avoidance, when the facts show that plaintiff and not defendant has been prejudiced by the delay of the company to state the facts.

In 1854, when the agent made his report that the certificates had been duly transferred, Lipscomb, Love, Jones and Smith were all alive and the transactions recent enough to have been recollected. In 1858, when request was again made on the company to show the transfers, these persons were still living.

In 1869 the request was renewed. Love died June, 1874 (217). Jones was still living, and sometime between that time and 1874 the attorney of the company was writing Molton, the executor of Ware's estate, that "the books of the company are sealed unless we can break the seals in some legal manner" (225); and again, that "facts can only be had through testimony of agent of company in another suit" (224). During this period, say about 1874, the company was actually taking Love's affidavit to try and show that his conversion of the sixteen shares was not the act of the company by him as president (217).

Now, when all the parties are dead, the company discloses the facts and says the certificates were duly transferred, because the company had decided not to require any transfers, and if no transfers were made and the legal title still in plaintiffs, they are barred by lapse of time. The company, now, says further, that if plaintiffs had sued earlier defendant might have proved that White had only a partnership interest in the twenty-one shares Lipscomb's memoranda of 1844 shows belonged to White's estate alone.

The evidence of transfer, or not, is record evidence of the company, and in same condition now as when it came into the company's hands, and the company said to White's estate then that the legal title to the certificates had passed by due transfer.

Now, the company says that the legal title did not pass, but if you had not relied on our statement and sued sooner, we might have found some equitable defense againt the legal title, and therefore plaintiffs' suit is stale.

If the company was not satisfied to stand on the question of whether the legal title passed, then when demand was made they should have answered no valid transfer, but we have equitable grounds of defense; this they are now estopped from saying. The Supreme Court of the United States has said that there are a class of cases where concealment and lapse of time but strengthen right to recover, and goes into reasons why lapse of time is unimportant when the evidence is matter of record.

Badger vs. Badger, 2 Wall., 93, and quotation from Michaud vs. Girod, 4 How., 503.

In the case at bar, the transfers, the company say, were duly made in writing, and kept by the company, and plaintiffs were denied access to them and given the statement of the company that the transfers were duly made.

The legal title did not pass by what the company call transfers. The holder of the sixteen certificates recognized by the company as owner, we now know was not the owner. How can the company now ask the court of equity to aid against the legal title by inferring equities from lapse of time?

The leading cases in the United States Supreme Court as to the title not passing by unauthorized transfer of a non-negotiable instrument by a singular coincidence is where this same James Love, sold non-negotiable certificates of the Texas republic left in his hands by Combs, who had endorsed them in blank. Combs vs. Hodge, 21 How., 407, Hodge vs. Combs, 1 Black, 172, and the first case in Texas on same point is the opinion written by Abner S. Lipscomb in Menard vs. Shaw, 5 Tex. 338.

This law principle has been fully and frequently applied to transfers of certificates of stock even of incorporated companies and when no special limitations on transfers had been made as by the unincorporated company, who issued and prescribed manner of transfers of the certificates of the Galveston City Company.

Lowell on Transfer of Stock, §§143-4-6-9 and 13.

The company has taken up certificates evidencing shares belonging to White's estate, and these certificates show the legal title had not passed, and the facts are that certainly as to sixteen, the

holder was simply a holder for the owners, and had no interest in as well as no title to the shares.

The company not only took up these certificates and issued others to the holder, but afterwards bought from the holder, and now says the heirs of White have no right, because the holder was the owner as a matter of fact, and the certificates had, as matter of law, been duly transferred to and put the title to the shares in the holder.

The company says that if this be not so, the demand of plaintiffs is stale. This, under the facts, amounts to saying that time makes a transfer valid; that was no transfer in law or equity at the time. That the shareholder, an integral part of the corporation. can by the act of the corporation cease to be such part without transfer or sale by him of his part, and without having done anything that deprived him of his part by estoppel.

A share of stock is something that moths and dust doth not corrupt nor mere time enable a company to break through and steal; nothing but a dissolution of the company can end the interest of the shareholder as part of the company that he has not disposed of or lost by acts he is estopped to deny.

The mere lapse of time constitutes of itself no bar to the enforcement of an existing trust, and time begins to run against a trust only when it is openly disavowed by the trustee who insists upon an adverse right and interest *which is freely and unequivocally made known to the cestui que trust.*

Oliver et al. vs. Piatt, 3 How. (U. S.), 411.

The relation between the defendant company and David White during his lifetime, and, after his death, between the defendant and the complainants as to the shares of stock sued for, was that of *trustee and cestui que trust*—trustee for the protection of their interest and title; and it holds to-day those shares which its officers permitted to be transferred without authority, and which it subsequently purchased for itself, in trust for these complainants as the next of kin and heirs at law of David White.

Bayard vs. Farmers' Bank, 52 Penn. St., 235.
Telegraph Company vs. Davenport, 97 U. S., 371–372.

The defenses of laches and limitations can not prevail where the relief sought is grounded on a charge of fraud and concealed by the party, or which, from its nature, remains secret, and it appears that suit was commenced within a reasonable time after the evidence of fraud was discovered. (Meader vs. Norton, 11

Wallace, 458; Bailey vs. Glover, 21 Wallace, 342, 347, 348, 349.) And there is no rule in equity which excludes the consideration of circumstances. (Michaud et al. vs. Girod et al., 4 Howard, U. S., 561.) And absence of complainants from the State is a matter for consideration.

Sears vs. Eastburn, 10 How., 187.
Galt vs. Galloway, 4 Peters, 346.

Lapse of time merely will not make that valid which was originally invalid.

Law Rep., 3 H. L., 275.
Ormsby vs. Cooper Min. Co., 56 N. Y., 623.

POINT V.

The power of attorney from White to Lipscomb did not authorize sales to be made after White's death, and it devolves on the company to show that the twenty shares of David White's trustee stock taken up after his death by the company, and certificates of the corporation given for them, were sold, and that sale was before White's death.

STATEMENT.

David White, to whom they were issued, died in Alabama, December 10, 1841. He had placed the certificates, sued for, in Texas in the hands of Abner S. Lipscomb, and had given him power of attorney, as follows: (229)

" UNITED STATES OF AMERICA, }
" State of Alabama, City and County of Mobile. }

" Know all men by these presents that I, David White, of the " city of Mobile, have and by these presents do make, constitute " and appoint Abner S. Lipscomb my true and lawful attorney " in fact for me and in my name to alien, release, assign and " convey any or all of my Galveston stock, or any stock or in- " terest I may have in the city of Galveston, on Galveston isl- " and, in the republic of Texas, or any real estate or town lots I " may be entitled to, in law or equity, in the town of Matagorda,

" in the said Republic of Texas, hereby ratifying and confirming " the acts of my said attorney in fact, which he may do, execute " or perform in as full and ample manner as I could myself if " personally present.

" In testimony whereof I have hereunto put my hand and seal " this the 8th day of April, A. D. 1839.

[SEAL] " DAVID WHITE.

" Witness: DAVID FILES."

This was of record in Galveston county (18–83), and this was the authority to Lipscomb as recognized by the company (49). The answer admits that the company did not take up their twenty David White certificates until after his death. Its allegation is as follows:

" Defendant further says that the surrender of said certificates " to said company, and the issuance of new certificates to parties " holding the same, did not take place until subsequent to the " alleged date of the death of said White. The said sixteen cer- " tificates were surrendered by and certificates in lieu thereof " issued to James Love, March 4, 1842; said certificate No. 27 " was surrendered by Levi Jones and certificate in lieu thereof " issued to him September 9, 1844, and said certificates Nos. 10, " 12 and 28, were surrendered to the company by said Ashbel " Smith and certificates in lieu thereof were issued to him March " 5, 1845." (22.)

The defendant, by its answer, alleges that the sixteen certificates surrendered to the company by James Love, after death of White, had been sold before White's death, but there is no evidence to sustain this allegation, and, to the contrary, the evidence, by Love's receipt, is that they were left with Love until called for by Lipscomb, and after White's death and after Love had surrendered them to the company and taken new, or corporation, certificates in his own name, Lipscomb stated in writing (found among Lipscomb's papers after he died), that these sixteen certificates and four more he held belonged to the estate of David White, and he wrote, but never delivered, an order on Love for delivery of the sixteen certificates to executor of estate of David White.

AUTHORITIES.

Hunt vs. Rousmanier, 8 Wheat., 203.
Locket vs. Hull, 1 Wood C. C., 558.
Cleveland vs. Williams, 29 Texas, 205.
Galt vs. Galloway, 4 Peters, 344, 345.
Story on Prom. Notes, §378 and note.

The answer shows that the defendant argues that as Lipscomb held a power of attorney from White to sell the stock, that if Lipscomb had an interest with White in the stock or proceeds, that this made a power coupled with an interest that enabled the power to be exercised after White's death.

This is disposed of on the facts as to the sixteen shares, in that Lipscomb did not sell or undertake to sell to Love, but simply left the certificates till called for. The three that Smith and one that Jones were recognized as owners of, by the company, were not assigned according to the deed of trust and certificate formalities, and as the legal title was not in the holder, it devolves upon the company under their claim that Lipscomb had a power that survived White, to show that Lipscomb equitably conveyed these shares. The company says they passed from hand to hand, because the officers of the company only required the mere surrender of the certificate, and would thereupon issue a renewal certificate to the holder; and while it was very particular as to further renewals of this new certificate, it dispensed with any formal transfer of the original or trustee certificate. The possession of Jones and Smith, as being men of character, then proves nothing, as there is no evidence that they got them from Lipscomb or that Lipscomb ever sold them.

Lipscomb's memoranda, made in 1844, shows that he then had four shares. The certificates he was prepared to deliver to Ware, executor of White's estate at Walnut Bluff, on his signing the receipt therefor Lipscomb had prepared.

These four that Smith and Jones afterward surrendered to the company, being the only four of the White trustee certificates outstanding, and renewed certificates not being transferable by assignment and delivery, as the company strictly required transfers in the company's office and on its books, it is fair to presume that these are the four shares that Lipscomb said he had on January 8, 1844. White died December 3, 1841. Lipscomb had a power to sell, but the legal title to the shares was in White's estate, and therefore it was not a power that survived and enabled sale after the maker's death. The power must be coupled with title, or the title can not pass after the death of the maker. The attorney must have received by the instrument all that he attempts to convey after the maker's death.

While the maker is alive the act of the attorney is the act of the principal, and if the title was not conveyed by the power, but simply the right delegated to convey the title standing in the principal, the power dies with the death of the maker.

The naked power can not live without its maker. A power of attorney is revoked by the death of the party giving it, and is no longer of any validity, and if an act be done in pursuance of the power subsequent to the decease of the principal, the act is void, though the principal's death be unknown to the agent.

Hunt vs. Rousmanier's Administrators, 8 Wheat., 174.
Cleveland vs. Williams, 29 Texas, 205.
Galt vs. Galloway, 4 Peters, 344, 345.
Story on Prom. Notes, §378 and note.

A careful examination of Hunt vs. Rousmanier, 8 Wheat., 203, and the very instructive case on the same point of Locket vs. Hull, 1 Wood, 558, shows that a power that lives after the death of the maker is a power coupled with the title to the thing conveyed.

If White had put the legal title to the shares in Lipscomb, and given him a power of attorney to sell, then Lipscomb could have conveyed the title after White's death; but the mere fact that Lipscomb was to have an interest in the sale of the shares, or even in the shares themselves, would not give him power to assign the certificates after White's death, because if title remained in White it passed to his estate at his death, and the attempted transfer would not be divested. The power must be coupled with title to enable the title to be conveyed when death has prevented the conveyance from being anything more than the act of the attorney.

Lipscomb had said in writing on January 8, 1844, that these shares belonged to White's estate. There is no evidence that Lipscomb ever sold or attempted to transfer them to any one. If he did, it devolves upon the company to show it, as there are no transfers on the certificates.

The company, recognizing this, attempted to prove by Smith that he got the three certificates before White's death. He admitted that he had no independent recollection as to when and from whom he got the certificates, but undertook to date the transaction by saying he never owned but four certificates and bought three of those to pay for certain lots in Galveston and at once turned them over to his vendor, Hunt. The books of the company show that, to the contrary, Smith had these certificates renewed to himself March 5, 1845, and they so stood on the books of the company as his till June 9, 1847, when he sold them to J. M. Jones and transferred them on the books of the company by and through A. F. James, to whom he executed a formal power of attorney, executed in Harris county, May 5, 1847. (93.)

Under the practice of the company to recognize the holder of a trustee certificate whether indorsed or not, any number of trustee certificates might have passed through his hands (51.) Smith had no recollection of these certificates, and, when first asked as to them, thought he got them from Hunt. (See Exhibit A to defendant's answer, 37.)

Smith was very old when his deposition was taken, and while he states he had always been careful and exact and had owned but little property, he had to be refreshed by reference to the records before he could recollect making a mortgage in 1850 on the lots in Galveston he thought he bought in 1840 with the certificates. (159 to 164.)

The other three sued for were (Book C, numbers 36, 39 and 33 of trustee stock) on December 3, 1841, transferred by the company from the name of White to that of Lipscomb, issuing renewal certificate therefor, No. 274. On December 10, 1841, White died in Alabama. On March 4, 1842, the company allowed Lipscomb to transfer on the books of the company renewal certificate No. 274 to James Love, the then president, and the memoranda of Lipscomb shows that of the fourteen shares he sold Love March 4, 1842, these were part.

The statement of Lipscomb on January 8, 1844, in writing, when preparing to make expected settlement with White's executor, that there were on hand of the shares White placed in his hands twenty-one shares belonging to White's estate, is very strong evidence that the claim of these plaintiffs on the company is valid, for at least the twenty-one shares, as it was an admission by Lipscomb against his own interest.

It is very clear that White's estate received nothing from or in pay for these shares (106 to 112, 152), and the company deprived White's estate of the certificates, evidencing their shares instead of protecting their interest, and the company should now issue new certificates and recognize plaintiffs as shareholders.

The sixteen shares left with and used by Love, and the three Ashbel Smith and the one Levi Jones renewed, and who were recognized by the company as owners, and for which Lipscomb prepared a receipt, to be signed by the executor of White on January 8, 1844, are twenty shares, that, being the property of White's estate, were used by others, with the active concurrence of the corporation after White's death. When we analyze the evidence we find that Lipscomb, at dates the company took up these twenty certificates, had never undertaken to sell them.

This is the fact, and it is further the fact that Lipscomb, on January 8, 1844, recognized and admitted, against his interest, that these certificates belonged to David White's estate.

It follows, therefore, that the court is saved the question of going into the legal effect of the power of attorney from White to Lipscomb, as it was never used as to these twenty shares.

POINT VI.

As to the defense of partnership, the evidence does not show there was any partnership as to the shares sued for.

If there is any evidence of partnership between Lipscomb and White it is contained in memoranda found among Lipscomb's papers after his death, among which a paper signed by Lipscomb states that he then—January 8, 1844—held twenty-one shares belonging to White's estate. This memoranda shows that he held sixty-two shares and invested the proceeds of forty-one of them in property, in which he claimed a half interest with White's estate. The other twenty-one, he states, belong to White's estate. (244, 247, 248.)

This shows that the partnership was in the reinvestment of the proceeds of stock sold, and not in the stock until sold. On the day after the date of this memoranda the order was written by Lipscomb on Love for the sixteen shares, for which he held Love's receipt. This order was for Love to turn over the sixteen shares.

Taking the memoranda as a whole, it shows Lipscomb had an interest only when he reinvested. The memoranda certainly can not be divided so that the company can claim White had only a partnership interest in these sixteen shares, when Lipscomb admits the contrary to his interest by the memoranda that of the partnership matter he still had left twenty-one shares belonging exclusively to the estate of White, of which the sixteen he had left with Love were a part.

Judge Ballinger testifies that he understood from Love that the reason he never settled with Lipscomb for these shares was because they belonged to White's estate.

If there was a partnership between White and Lipscomb it ended with White's death, and three years after White died Lipscomb makes this written statement—that there are twenty-one shares the property of White's estate, and he writes an order on Love to have him deliver the sixteen certificates to White's executor.

When the evidence in this suit disclosed the true facts, it appeared that Love had, on March 4, 1882, two years before the date of this order, and while president (45), transferred the shares to his own name on the books of the company. (Exhibit B, between 48 and 49.)

White had been dead three months, and the transferred shares stood in White's name. The company made the transfer to Love, who was not the owner of the shares and only held the certificates therefor for Lipscomb for safe keeping. Love had nothing to show the company to authorize the transfer except the naked possession of the certificates.

The true facts were matters of record; were only disclosed to White's heirs by the evidence in this suit, and to meet these facts the company say that the shares were partnership property of Lipscomb and White, and therefore Lipscomb had authority to transfer them. The allegation of partnership is matter of avoidance that comes thirty-five years after the stock was transferred and after the company had reported to White's estate, in 1843, that the business had all been transacted by Lipscomb under power of attorney from White (49.) Again, in 1854, the company certified that the shares had been duly transferred. (Exhibit B, 48.) In 1854 Lipscomb, Love and Gail Borden were all alive (45), and if the company knew or recognized any partnership interest and had stated that they relied thereon, the matter could have been satisfactorily inquired into. After the lapse of thirty-five years this affirmative matter of avoidance is not only stale, but the repeated statements of the company as to the character of Lipscomb's authority to be under the power of attorney now estop their denying it. The fact, however, shows that Lipscomb never sold or transferred these sixteen shares, either as partner of or attorney for David White. Love's receipt to Lipscomb shows they were to be held until Lipscomb should call for them. Lipscomb's order on Love for these shares, dated more than two years later, shows that Lipscomb supposed that Love still held them for him. There is no evidence showing that Love ever claimed any right to them. In 1874 the company took the affidavit of Love as to these sixteen shares for fear that the receipt of Love, being president, would be considered the receipt of the company. This was done at the suggestion of the attorney who filed answer for the

company, and who at that time held the papers and claim of plaintiffs to this suit. Love's affidavit was that all his "transactions" with Lipscomb were personal matters. It is further in evidence that Love's excuse for not settling with Lipscomb for these sixteen shares was that the matter was open between Lipscomb and White's estate. The memoranda made in 1844 by Lipscomb, when he was expecting to meet Ware, the executor of White's estate, distinctly states that these sixteen shares and five more were the separate property of White's estate. Forty-one shares had been sold and the proceeds invested by Lipscomb, and he states that he had a half interest in the property so acquired. Whether these twenty-one shares that were left were the separate property of White's estate, because Lipscomb was only to acquire an interest in proceeds after he had sold and reinvested, or whether his interest, being smaller than White's, a half interest in the proceeds of forty-one shares covered all of Lipscomb's interest and left the twenty-one shares belonging entirely to White's estate, matters not.

Lipscomb did not claim any interest in the twenty-one shares, and White had been dead nearly four years, and the shares had not been transferred by Lipscomb, but he held certificates for four of them, and for sixteen he held the receipt of the president of the company with whom he had deposited them. Whether these sixteen shares were partnership property or individual property of White, it is certain that Lipscomb, neither as partner nor as attorney in fact for White, ever sold or transferred them to Love. Love was simply holding for Lipscomb, and Lipscomb held his receipt to that effect.

In taking Love's affidavit the company, through its attorney, fully recognized that, unexplained, the holding of Love for Lipscomb might be considered the holding of the company.

Can it be said that where the president of a company holds certificates for safe keeping, and the company permits him to transfer to himself, without any authority, and without proof of ownership, that the distinction can be drawn so as to make the transaction an individual one, and not affect the company with notice? Can a president have transfers unlawfully made without the company being affected with all the facts connected with the transfer?

Is not the company liable by reason of the presidency of Love for the transfers in breach of his trust, as well as by the fact that there was no transfer of the certificates on which new certificates were issued to him?

If the sixteen shares were partnership property, still, as Lipscomb never sold or transferred them to Love, the company would be liable to White's estate for eight instead of the whole sixteen, and the affirmative defense of the company of partnership of White and Lipscomb, is an abandonment of the other defenses as to these eight.

The sixteen trustee certificates were Nos. 116, 118, 119, 120, 121, 122, and 124 of Book A, and of Book C, 34, 42, 43, 44, 45, 46, 47, 48, and 49. (P. 10 and 11 of answer and pp. 3 and 4 and 11 and 12 and exhibit B on p. 12 of Transcript.)

The company bought all said shares at various times between 1842 and 1854. (17.)

If there was a partnership, and the company allowed transfers after White's death, it could only be justified by showing that there had been sales made to wind up the firm. The evidence is, that twenty certificates, one share each, had not been sold, and by reasonable diligence the company would have known that they still belonged to White's estate. And it further appears that White's estate is not estopped, as the holders of these certificates do not show regular transfers, nor is there any act of White's executors misleading the company.

These three to Smith and one to Jones are the four—Nos. 10, 12, 27 and 28, Book C—that were outstanding and could not be reported as to by the company when, in 1843, it rendered statement to executor of White's estate (11, 12); and yet after thus reporting these shares the company within two years thereafter renewed the certificates to Smith and Jones, when the trustee certificates they surrendered stood in White's name and there had been no transfer, and only a blank indorsement by Lipscomb as attorney in fact, and that not dated.

The best the company can say in defense as to these is that they might have been sold by Lipscomb before White's death. As against this, is the lapse of time after White's death, and the further fact that in January, 1844, Lipscomb states that he then had on hand for the estate of White twenty-one of the original sixty-two White shares, and he writes an order on Love for sixteen, and prepares a receipt for White's executor to sign for four more. All the other forty-one, he states, he had sold, and names the property he had invested in.

So in January, 1844, it appears that Lipscomb had in his hands the three certificates Smith surrendered March 5, 1845,

and the one Jones surrendered September 9, 1844, because there was no other four trustee certificates outstanding and which he could have then held, to deliver to Ware, executor of estate of White.

The company recognized the holders of these four certificates as owners without any notice to White's executor and without any inquiry or proof as to their not being the property of White's estate. Afterwards when the matter was fresh, and Lipscomb, Jones, and Borden all alive, the company, by its present agent, certified that these four certificates had been duly transferred. That agent now testifies that as a lawyer and business man he still thinks the indorsement of the name by attorney in fact was and is due transfer.

When the executor of White sent his agent to the company the parties to the transaction, Love, Jones, and Borden, were all alive.

When the executor of White's estate asked to see what the company call duly transferred, then the company by a resolution of its directory sealed its papers against the desired examination, and the seal has never been removed or the facts known until these trustee certificates were shown after this suit was filed, and the company now takes great credit to itself for showing them to plaintiff's attorneys after suit without waiting for *subpœna duces tecum*. If it is a good defense for the company to say that it was their custom to recognize mere holders as owners of trustee certificates, then it was good at the time the company made the transfers. If it was not good defense then, it is not now (47, 83.)

The deed of trust and certificates called for formal transfer. White lived in another country from the Republic of Texas, and the only certificate he ever personally transferred was acknowledged by him before a notary (56), and when he authorized Abner S. Lipscomb to sell his shares he did not do it by indorsing certificates in blank, but he made a formal acknowledged power of attorney, which was put on record and recognized by the company, and the agent of the company in 1842 certified that they recognized the authority of Lipscomb only as given by this power of attorney.

POINT VII.

As to the right of plaintiffs to sue as heirs of David White.

STATEMENT.

The bill alleges (8 and 9).

Your orators further show that afterward, to-wit, on the 10th day of December, 1841, the said David White departed this life, leaving Mary S. White, his wife, and your orators, the said Asenath A. Ware, widow of Robert J. Ware, his daughter; Daniel O. White and Clement B. White, only children of his deceased son, J. Osborne White; David P. Lumpkin, only child of his deceased daughter, Lucy S. Lumpkin, and Thomas W. Cowles and Mary A. Holtzclaw, only children of his deceased daughter, Mary A. Cowles, his five grandchildren, his only heirs-at-law him surviving.

Your orators further show that the said Mary S. White, relict of the said David White, departed this life at some time in or about the month of ——, in the year of our Lord eighteen hundred and fifty-three, without having assigned, transferred or in any manner disposed of such right or interest in said twenty-four shares of stock as she possessed or was entitled to as the surviving wife of said David White, deceased, leaving your orators, the said Asenath A. Ware, her daughter, and the said Daniel O. White, Clement B. White, David P. Lumpkin, Thomas W. Cowles and Mary A. Holtzclaw, her five grandchildren, her only heirs-at-law her surviving, who as such, and as the only heirs-at-law of the said David White, deceased, thereupon became and were and are entitled to have and receive the said twenty-four shares of stock to their own use; that the personal estate of which the said David White died possessed as aforesaid was, in amount and value, much more than sufficient, exclusive of said twenty-four shares of stock, to pay and satisfy his just debts and funeral expenses; that such, his debts and funeral expenses, have long since been fully paid and satisfied, and that there is no administration of said decedent's estate in the State of Texas, nor is there any necessity for such administration.

The answer alleges (30): Defendant, for further answer and defense to said bill, says that it has been informed and believes, and therefore alleges, that the said Robert J. Ware, a citizen of Montgomery, Alabama, purchased for valuable consideration from each and all of the complainants in this suit who, under the

terms of the wills of David White and Mary S. White, had any right or interest whatever in the said stock which is the subject of this suit, provided any such right existed in said estates, or either of them, and received transfer, including all such right, and became the sole and exclusive owner thereof. Defendant can not give the date or particulars of said purchase and conveyance more particularly, the same being fully within the knowledge of said complainants, and notice is given to complainants to produce and show said conveyances, or secondary evidence will be produced if the originals can not be obtained; and defendant expressly denies all right and title in the complainants, and each of them, in the subject matter of this suit, any and every part thereof, and alleges sale thereof as aforesaid to the said Robert J. Ware many years ago, and long prior to the institution of this suit.

And defendant, further answering herein, repeats its denial of any right or title of complainants herein, or any of them in this cause, as heirs or heirs-at-law of the said David White or the said Mary S. White, each of whom made his or her last will, duly probated and valid by the laws of Texas therefor, and devised all their estate and property whatsoever.

Asenath A. Ware, plaintiff, is the widow of R. J. Ware (152, 154). T. J. Molton testified (113, 114): Complainants (including Mrs. Asenath A. Ware, residuary legatee under the will of Robert J. Ware, and entitled as such to whatever interest, if any, in the said stock her husband may have acquired by virtue of the transfers by some of the complainants), in order to simplify, save expenses and rid themselves of the troublesome question of forced heirship in Texas, had, before the filing of this bill, mutually agreed to participate in and prosecute their respective interests and claims in their capacity of heirs-at-law of David and Mary S. White, these complainants being all capable of contracting *inter esse* and being all the persons that ever took any interest whatever in either estate of David or Mary S. White under the law, the wills or the transfers, and every interest in the subject matter of this controversy being represented in the present complainants.

Thos. J. Molton, witness for plaintiffs, testified on cross-examination (127, 128):

Was the estate of David White a solvent estate; did it pay all debts and liabilities in full; did it not owe a very large amount of money to said Robert J. Ware which was never paid? And state the amount, or, if not able to state such amount, state all

facts within your knowledge and information tending to show fully and fairly the condition of the estate of David White as respects indebtedness or liabilities to Robert J. Ware. Have you answered fully to your best judgment and information on that subject?

Thirteenth answer to the thirteenth interrogatory—He saith: The estate of David White was largely solvent and paid its debts in full. By a partial settlement in probate court of Montgomery county, Alabama, I had the impression that his estate was indebted to R. J. Ware in the sum of forty-odd thousand dollars, but a later examination of the records of the chancery court showed me that said indebtedness had all been settled under a regular decree.

Fourteenth cross-interrogatory—Did David White die intestate?

Fourteenth answer to the fourteenth cross-interrogatory—He saith: David White left a will, dying testate.

Fifteenth cross interrogatory—Did David White die intestate as to any estate, property, or right owned by him at his death? And state the parts or clauses of his will on which your answer is founded.

Fifteenth answer to the fifteenth cross-interrogatory—He saith: David White, after disposing specifically in the body of his will of his slaves and much other property, made disposition in the residuary clause of the rest and residue, mentioning therein lands, scrip, notes, and other things, but not the interest or claim in or to the stock matter in Texas.

Sixteenth cross-interrogatory—Did Mary S. White die intestate?

Sixteenth answer to the sixteenth cross-interrogatory—He saith: Mary S. White also left a will, dying testate.

Eighteenth cross-interrogatory—Did Mary S. White die intestate as to any estate, property, or rights owned by her at her death? And state the parts or clauses of her will on which your answer is founded.

Eighteenth answer to the eighteenth cross-interrogatory—He saith: The same answer given to the question in the fifteenth interrogatory as to David White's intestacy as to any estate, property or rights is applicable to Mary S. White, except that in her case she made testamentary disposition of certain Texas interests in different parts of her will, but failed to mention anything about the Galveston stock matter or any interest or claim in or against the City company.

Twenty-first cross-interrogatory—You are asked in the direct interrogatories whether you have read the bill and answer. Did you say you had read them? The bill alleges in substance that the complainants named, except Holtzclaw, husband of Mrs. Holtzclaw, took whatever interest David and Mary S. White had in the stock sued for by descent as heirs-at-law of said David and

Mary S. White. Is it true that said complainants did so take by descent? Is it true that said David White and Mary S. White, or either, and if so, which one of them died intestate?

Twenty-first answer to the twenty-first cross-interrogatory—He saith: I have read the bill and answer. The interests that the complainants, except Holtzclaw, took under David and Mary S. White in the stock sued for was by descent as heirs-at-law of said Whites or by their wills, according to the legal construction that different attorneys would put on the matter. I have answered that David and Mary S. White died testate. (129.)

The witness Molton further testified, on cross-examination (137, 138): It appearing in the investigation that some of the heirs of White had transferred their interest in his estate, and that of his wife and widow, to R. J. Ware, the said Ballinger, Jack & Mott were to assert the claim to the lots and lands in whosesoever names they considered best entitled under the law and all the facts and papers of the case, and afterwards to satisfy purchasers of the same to the superiority of their title to that of any and all claimants. These are the true bases and correct theory on which said attorneys were employed. They were consulted, and especially Judge Ballinger, with regard to the proper parties for the stock suit to be brought in the name of, and his opinion, as expressed, was that he would probably decide to assert the claim in the names of the heirs of the Whites, as he doubted whether the transfers made by some of them to R. J. Ware would carry their interests in the stock, if anything at all, Dr. Ware being at the time executor of White, and the stock not in sight, and therefore not in the contemplation of the parties making the transfers, and the consideration entirely disproportional to the probable value of the recovery.

Ballinger, Jack & Mott, on June 5, 1869, gave Molton a lengthy opinion, that it was doubtful whether the plaintiffs in this case took as heirs of David and Mary White, or whether their respective interests are controlled by the wills of David and Mary White, under which it passes to the same parties as devisees. (251, 252, 253.)

There had been administration in Texas on the estate of David White, but it was closed in 1853. (234.)

The plaintiffs being devisees and also heirs agreed to take as heirs. (152 to 154; 113, 114.)

ARGUMENT.

It is asserted, as matter of defense, that plaintiffs are not entitled to take as heirs, but as devisees.

The attorney who drew the answer had given an opinion that it is doubtful whether the plaintiffs take as heirs or devisees of David and Mary White.

To avoid this question plaintiffs agree that their respective rights shall be as heirs, and under this they sue as heirs. There can be no question but that they had a right to agree that the wills did not touch this property, and that they took their respective interests as heirs at law, and not as devisees. If their construction of the wills was not the legal construction, it would still settle their rights, as they had a right to waive the wills and take as heirs to avoid the question of the construction of the wills.

EXPLANATION AS TO EVIDENCE.

An appeal is practically trial de novo, and the record in this case covers nearly 300 pages, much of which is testimony that cuts no figure in the case or only bears on some one point. It may therefore facilitate the court to show the respective connection, with the case, of testimony of each witness.

There is a part of the record, from pages 230 to 241, that has no direct bearing in anyway on the case, and if relevant from any standpoint it is to show that David White had other interests in Texas, and business with the defendant other than as a stockholder.

The first witness for complainants is James P. Cole, agent, secretary and general manager of the Galveston City Company, who had no personal knowledge of the facts as to the shares sued for, but having been the manager of the company since 1854 and doing all its work is familiar with the books and papers in his charge and produced the same, as put in evidence, with general explanation of the methods of the company and a recitation of its history. His testimony will have to be read, and is from page 38 to page 101.

J. Darrah (101 to 103), witness for plaintiffs and president of the company, and has been for many years. Signed the answer in this case and swore to it, but knew nothing as to the facts it alleged except from statements of the agent, Judge Cole, who had been a good lawyer and of high character, and who alone attended to all business of the company he did not think of enough importance to refer to the company.

T. J. Molton, witness for plaintiffs (103 to 146), is the husband of a daughter of plaintiff Asenath A. Ware. Was sent to Texas in 1869 to see after the Texas interests of the estates and heirs of David and Mary White. His deposition is as to the general history of the matters connected with this suit. In connection with his deposition are a number of letters as exhibits, and of those letters such as are connected with correspondence of Ballinger, Jack & Mott as to this suit, for convenience and to avoid repetition, are by agreement, only given once (250), and that in connection with the testimony of W. P. Ballinger, of counsel for defendant, and said letters will be fouud on pages 250 to 272 of record.

The testimony of R. Y. Ware and Asenath A. Ware for plaintiffs (146 to 155) is as to heirship of plaintiffs and their election to sue as heirs, and as to the fact that neither estates of David and Mary White nor their heirs ever got anything from or pay for the shares this suit is for.

The witness Ashbell Smith (59 to 65), for defendants, was to prove that he bought three of the shares sued for before death of David White. He gave his age as 75. Thought he knew all about the three shares and dates of transaction, but the books of the company show conclusively that he was mistaken on every point, and when his memory was sought to be refreshed by his signature on stock books and to power of attorney he had to admit he had no recollection whatever of what the books showed, and while he recognized them as correct on their face, he had no independent recollection of the facts. The old man was under the impression that it had been a remarkable fact of his life that he never owed any man, but on his recollection being refreshed from county records, he had to admit that we had put two mortgages on the only two lots that he ever owned in Galveston.

Joseph Bates (165) for defendant, aged 76: "White told me "that the interest of himself and Lipscomb in the investment in "Galveston was a partnership between them. I understood they "owned the whole of Galveston Island."

W. H. Goddard (172 to——.) Lawyer and director since about 1854 to 1881, represented the company in suits brought against it by Harding heirs and other suits. Has no personal knowledge of any facts in this case. Was one of the committee of directory who examined all the transfers on the trustee certificates that had been renewed, and which committee had the resolution passed prohibiting anyone to inspect books or papers of company. Thinks this was done soon after and because of the Harding suit in 1856. The examination made by the committee was to see if there was anything in the transfers to effect value of the stock (183.) The agent of the company was present and assisted the

committee in the examination. Most of this deposition is as to the time of employment and nature of employment of Ballinger, Jack and Mott by the defendant.

W. B. P. Gains (199 to 200), for defendant: "Seventy-four "years old. White told me he had given Lipscomb a power of "attorney as agent to look after his business. Lipscomb told me "he had a half interest with White as his attorney and agent." (199.)

J. A. Lipscomb, for defendant: Thirty-two years old (207) and son of Judge Abner S. Lipscomb. Knows nothing but that old papers of his father's were turned over to lawyers representing estate of David White. A. S. Lipscomb died in December, 1857.

W. P. Ballinger (211 to 228 and 242 to 272), witness for defendant, wrote out his statement (211 to 228) which was accepted as his deposition subject to the right of cross-examination thereon at some subsequent time on behalf of plaintiffs. This was done, some time having elapsed and other evidence introduced so that the cross-examination commences on page 242 and with exhibits of letters written by the witness extends to page 272.

One of the explanations against delay and of diligence used by the plaintiffs had been that the papers connected with the matter had been placed by Molton in hands of Ballinger, Jack & Mott in 1869 and the defendant and W. P. Ballinger thought that it was right to undertake to show, as W. P. Ballinger had filed the answer in this suit, that he was not the regular retained attorney for the defendant during the time his firm held the papers of the plaintiffs.

The plaintiffs contend that the evidence shows that from the letters of the firm to Molton, plaintiffs had a right to understand that their rights were not being prejudiced by delay of Ballinger, Jack & Mott to file suit and that the defendant cannot now be heard to say by answer filed by Ballinger & Mott that it was laches not to have filed suit during the time the plaintiffs' papers were in the hands of Ballinger & Mott from 1869 to near the filing of this suit.

Respectfully submitted,

WALTER GRESHAM,
Counsel of Record, joined by
M. C. McLEMORE,
S. W. JONES,
G. E. MANN,
Of Counsel for Complainants, Appellants.

146 US 102

Office Supreme Court U. S.
FILED.
OCT 6 1892
JAMES H. McKENNEY,
CLERK.

UNITED STATES SUPREME COURT.

ASENATH A. WARE, DANIEL P. LUMPKIN, MARY A. HOLTZCLAW AND JAMES HOLTZCLAW, her husband, THOMAS W. COWLES, DANIEL O. WHITE AND CLEMENT B. WHITE,

Appellants,

vs.

THE GALVESTON CITY COMPANY,

Appellee.

Appeal from Circuit Court, U. S., for Eastern District of Texas, 5th Circuit.

BRIEF FOR APPELLEE

BY

A. H. WILLIE,

Counsel of Record.

committee in the examination. Most of this deposition is as to the time of employment and nature of employment of Ballinger, Jack and Mott by the defendant.

W. B. P. Gains (199 to 200), for defendant: "Seventy-four "years old. White told me he had given Lipscomb a power of "attorney as agent to look after his business. Lipscomb told me "he had a half interest with White as his attorney and agent." (199.)

J. A. Lipscomb, for defendant: Thirty-two years old (207) and son of Judge Abner S. Lipscomb. Knows nothing but that old papers of his father's were turned over to lawyers representing estate of David White. A. S. Lipscomb died in December, 1857.

W. P. Ballinger (211 to 228 and 242 to 272), witness for defendant, wrote out his statement (211 to 228) which was accepted as his deposition subject to the right of cross-examination thereon at some subsequent time on behalf of plaintiffs. This was done, some time having elapsed and other evidence introduced so that the cross-examination commences on page 242 and with exhibits of letters written by the witness extends to page 272.

One of the explanations against delay and of diligence used by the plaintiffs had been that the papers connected with the matter had been placed by Molton in hands of Ballinger, Jack & Mott in 1869 and the defendant and W. P. Ballinger thought that it was right to undertake to show, as W. P. Ballinger had filed the answer in this suit, that he was not the regular retained attorney for the defendant during the time his firm held the papers of the plaintiffs.

The plaintiffs contend that the evidence shows that from the letters of the firm to Molton, plaintiffs had a right to understand that their rights were not being prejudiced by delay of Ballinger, Jack & Mott to file suit and that the defendant cannot now be heard to say by answer filed by Ballinger & Mott that it was laches not to have filed suit during the time the plaintiffs' papers were in the hands of Ballinger & Mott from 1869 to near the filing of this suit.

Respectfully submitted,

WALTER GRESHAM,
Counsel of Record, joined by
M. C. McLEMORE,
S. W. JONES,
G. E. MANN,
Of Counsel for Complainants, Appellants.

146 US 162

Office Supreme Court U. S.
FILED.
OCT 6 1892
JAMES H. McKENNEY,
CLERK.

UNITED STATES SUPREME COURT.

ASENATH A. WARE, DANIEL P. LUMPKIN, MARY A. HOLTZCLAW AND JAMES HOLTZCLAW, her husband, THOMAS W. COWLES, DANIEL O. WHITE AND CLEMENT B. WHITE,

Appellants,

vs.

THE GALVESTON CITY COMPANY,

Appellee.

Appeal from Circuit Court, U. S., for Eastern District of Texas, 5th Circuit.

BRIEF FOR APPELLEE

BY

A. H. WILLIE,

Counsel of Record.

United States Supreme Court,

ASENATH A. WARE, DANIEL P. LUMPKIN, MARY A. HOLTZCLAW and JAMES HOLTZCLAW, her husband, THOMAS W. COWLES, DANIEL O. WHITE and CLEMENT B. WHITE,
Appellants,

vs.

THE GALVESTON CITY COMPANY,
Appellee.

Appeal from Circuit Court, U. S., for Eastern District of Texas, 5th Circuit.

Brief for Appellee

BY

A. H. WILLIE, Counsel of Record.

Appellee controverts appellant's statement of the case as incorrect in many respects, and the following is submitted as its abstract of the case, and statement of the questions involved :

THE BILL.

The bill was filed March 18, 1881, by complainants, suing as heirs at law of David White, who died December 10, 1841, and of Mary A. White, his wife, who died in 1853, the said Asenath A. Ware being their daughter, and the other five complainants,

their grandchildren. It sues for the recovery of twenty-four shares of the capital stock in the defendant company ; part of 67 shares issued by the company to and in the name of David White, November, 1838, for which he subscribed and paid. That the league of land on which the City of Galveston is situated was conveyed to Jones, Green and Johnson, trustees, June 15, 1837, for the purpose of laying off said city, sale of lots, etc., and said trustees issued and sold 1000 shares of stock, the holders of which formed a joint stock company, elected Directors, etc., said 67 shares being a part of said stock. Incorporation of the company was originally designed, and was made 1841. That the deed to said Trustees provided that transfers of said stock might be made by endorsement thereon, signed and sealed before two witnesses, and acknowledged before a Justice of the Peace or notary. That on the 8th of April, 1839, said David White executed a power of attorney to Abner S. Lipscomb to alien, assign and transfer, or convey, any or all of his Galveston stock, or any stock or interest he might have in the City of Galveston, thereby ratifying the acts of his attorney in the premises in as full and complete a manner as he, White, could, if personally present.

That said 67 shares were delivered to Lipscomb—that on the 3d of December, 1841, Lipscomb, as agent and attorney of White, with the consent and connivance of the defendant company, and in fraud of White, surrendered three of said shares, 33, 36 and 39, out of Book C, and received in lieu thereof, three renewed certificates in his own name. That at his death, David White remained owner of twenty-one others of said shares, numbers of which are stated—which were never lawfully sold or disposed of, and passed to complainants as heirs at law of both said David and Mary White, whose estates were solvent, all debts paid, and no necessity of administration. That after the death of said David White, the said Lipscomb, with the consent and connivance of defendant, without authority and in fraud, assigned and transferred said twenty-one shares of stock to other parties, to whom the company issued new shares, taking up and cancelling said original shares—that said transfer was void, and said company was in "contemplation and construction of law a party to the illegal acts of said Lipscomb," and holds said stock in trust for complainant.

That the company has always studiously concealed the aforesaid matters relating to the stock of said White, and particularly said illegal acts of Lipscomb, and the company's participation therein, by withholding all information in reference to said stock, and persistently refusing them access to its books and papers containing a record and history thereof, whenever applied to for that purpose ; and complainants were in total ignorance of said illegal acts of said Lipscomb and of their rights until about 12 or 14 months next before the filing of the bill. That complain-

ants, at the death of said White, except said Asenath Ware, were minors of tender age, residing then and since in Alabama and Florida, and were not apprised until some years after his death even of the fact that he owned shares of stock in said company ; after learning which, in 1869, and again, March 19, 1879, they made application by their agent, Molton, and at divers other times by other persons for information as to disposition, if any, made by White of his shares of stock in his lifetime, and for permission to examine its books and papers to ascertain their rights, but the company refused all such applications.

That Lipscomb died, notoriously insolvent, in the year 1856, never having accounted for said twenty-four shares of stock. Prayer, that the transfer of said twenty-four sheres of stock be declared fraudulent and cancelled, and the same be decreed to be their property, and certificates issued to them for the same—or that the company be decreed to pay them the market value thereof, $ per share—and for general relief.

THE ANSWER

Claims first : All benefits of demurrer for want of equity in the bill. Second : That the alleged cause of action accrued more than thirty-five years before the filing of the bill, and that no reasonable or sufficient excuse is alleged for delay, or why the facts pretended to be known were not earlier discovered, nor is it shown how discovery was made ; nor any diligence to ascertain the same, nor excuse therefor, nor any statement as to any facts connected with the administration of said estates in Alabama, nor as to knowledge of the proper legal representatives in Alabama, nor to remove the presumption that the facts were known to them. The defendant pleaded that by the lapse of time the suit was barred by limitation.

Further, that this suit has been delayed such great lapse of time, and parties holding the several certificates of stock have many years ago obtained full value therefor in the property of the company, and the rights of third and innocent parties as the only holders of the present stock, have intervened, and been permitted to grow up, and become of great value as shown in the bill ; wherefore complainants' cause of action is barred by such lapse of time and laches. and is stale and inequitable, and ought not now to be heard in a Court of equity.

The answer shows that under claim set up by White against and under M. B. Menard, the grantee of said league and labor of land, White attempted in Mobile, Ala., to organize the plan of a company for its sale, and to issue and sell stock therein, which was resisted by Menard, the

validity of which stock was the subject of litigation and decision by the Supreme Court of Texas, (42 Texas R., pp. 631) to 562) to which reference is made. That Lipscomb resigned his office as chief justice of Alabama, and removed to Mobile, and was White's lawyer in his controversy with Menard, which was compromised, and the shares of stock issued to White in settlement, and that Lipscomb then resigned his seat in the legislature; and upon agreement and understanding between him and White of partnership in all said stock, he removed to and became a citizen of Texas, great inducement thereto being his said joint interest and partnership in said stock, and his right to the management, control and disposition thereof. Partnership between White and Lipscomb in all said stock is alleged, that Lipscomb became Secretary of the State, of the Republic of Texas, was a member of the Convention which framed the Constitution of the State in 1846, and became one of the Judges of the Supreme Court, from 1845 to his death in 1856, and bore the highest character for integrity and honor.

The answer shows that it was the practice of the company from soon after organization to the present time to schedule its prices for its lots, and to receive the shares of the stock of the company in exchange for lots selected by the holder of the stock, thereby surrendering and cancelling such stock, and the company thenceforward consisting of the holders of the remaining stock. *The bill makes the same averments, in substance.* In this way the original 1,000 shares of stock had been reduced, at the same time of the answer, to 45 shares and some fractions, and greatly augmented in value; and in this mode almost the entire property held in the city of Galveston was acquired by the surrender of stock.

That the certificates of trustees' stock (including said 24 shares) passed currently by endorsement of the name of the holder thereof, in blank thereon, in all the business transactions of that day relating to said stock, and the company, by its uniform usage and practice, only required to be satisfied of the genuineness of the signature of such endorser to entitle the holder under him to the surrender of such certificate, and to a new certificate of stock in his own name, if desired. That the date of endorsement, assignment or transfer of trustees' stock by such usage never in any manner appeared on any book or paper of the company, unless it appeared on the certificate, such date, whenever material, being investigated so as to satisfy the proper caution and prudence of the company at the time.

Defendant denies, on its best knowledge and belief, the sale and transfer of any of said certificates of stock by Lipscomb to have been made after White's death, and denies that any such sale, when made, was made by the entry on the Company's books. Sales, when made, were between the parties alone by endorsement of the grantee of the certificate, to the validity

and completeness of which no act of the company was is any manner necessary, proper or usual.

Explanation is made of the endorsements of each of the certificates on which the suit is based, and they are alleged to have been endorsed, sold, transferred and delivered prior to the death of White. If sold subsequently to his death, it is alleged that Lipscomb had full right and power therefor by virtue of his partnership, and joint interest in all said certificates, and of his interest therein, coupled with said power of attorney. That said White well knew the mode and custom of the transfer of said certificates, and if fraud or wrong was committed by Lipscomb, the Company was ignorant thereof; and if imposed upon by the powers intrusted to Lipscomb, the company received and cancelled such shares for full value in accordance with its usage and custom, and the claimants under White are estopped. That soon after the death of said White, his excutor in Alabama, with full knowledge and information from said Lipscomb of all matters in Texas, including said stocks, in which the estate of White had interest or claim, caused administration to be opened in Texas on the estate of said White, W. B. Lipscomb, son of A S. Lipscomb, being the administrator. Said estate claimed a large amount due from M. B. Menard, and its administrator brought suit against Menard and also against Levi Jones, trustee in the trust deed, and agent of the Galveston City Company, claiming a lien on all the property of the City Company, and seeking to enjoin all the operations of said Company until payment of the balanced claimed. Barry Gillespie, a lawyer of known great ability, was attorney of the administrator. Defense was made to said suit, and it was subsequently dismissed.

The answer alleges that all the facts as to the disposal of said stock by said Lipscomb were fully known to his executors in Alabama, to all parties interested under his will, and to the administrator in Texas. All concealment of any facts appearing by its record and books was denied, and the same were fully examined by the parties and their agents and attorneys, and with such knowledge no charge of fraud or wrong or liability on the part of the company was made. That up to April 21, 1868, all parties had unlimited, unrestricted access to the books and papers of the Company, and that the agents of Ware, the executor in Alabama, obtained full statement showning the date of issuance of every share of said stock and date at which they were surrendered to the Company. That all the titles to property in Galveston having originally emanated from the Company, and deeds not having issued for a considerable time after its organization, its directors became satisfied that its records were often used for purposes of unjust litigation and speculation, and the disturbance of titles and rights long held in good faith; and on account of what they believed the good

of the community, and also to protect itself from unjust harassment and litigation, of which, as it conceived, very signal instance had occurred, the Company, on the 20th of April, 1858, "ordered that no person be hereafter allowed to inspect the books of the Company except in the presence of the Board of Directors, or by its orders." That defendant is ignorant of the denial of any specific information ever made in relation to said stock, and alleges that the complainants and their agents had always been in possession of the facts on which their present statements are based—the allegation of transfer subsequent to the death of David White being unfounded, and without any recent information thereof. All such information was in their possession from the earliest period of their alleged rights, and defendant expressly pleads and alleges that the bill wholly fails to give reasonable excuse for their laches, and they should not now be heard in a court of equity.

It denies the allegation that Lipscomb died insolvent; on the contrary, after paying all debts, his estate was of considerable value. Denies that Lipscomb failed to account with the proper representatives of said estate, but made full account as to said stock, and all other interests of White's estate with which he had connection; that a large amount of said stock was sunk in lots in Galveston, and the estate of White has realized and recognized their partnership therein. Lipscomb made other investments of said said stock in other localities, and accounted therefor; and that said estate had a large, unsettled account with the Republic of Texas, which was the basis of the claim against Menard, and that Lipscomb and Gillespie continued its attorneys and settled the account due the Republic in its greatly depreciated currency, and prosecuted the suit against Menard. That Ware, executor of White, did set up claim against Lipscomb, growing out of the disposition of said stock which was denied by Lipscomb, and never prosecuted, though said Lipscomb was fully solvent.

Defendant further pleads and alleges that the said Robert J. Ware, many years ago and long before this suit, became the purchaser and owner of all the rights of the several complainants herein to the interests claimed by them, and denies their right and title to the same.

Expressly denies all right and title of complainants as heirs at law of David or Mary S. White, each of whom made valid wills devising all their property whatever.

At the time of the death of David White said stock in said company was of the value of about $150 per share, and did not advance above $175 per share until 1854. Before the civil war it had considerably appreciated in value, and since the war at one time reached $10,000; is now quoted at $9,000 bid, $9,500 asked.

Of all the known stockholders no original stockholder has

been for many years a stockholder in the company. Certificates have passed currently from hand to hand by way of sale, security and all forms of dealing common to a commercial community.

The right of each and every purchaser of stock since the cancellation of said shares, has been acquired on the belief in good faith of the extinction of said twenty-four shares, the holders of which obtained full value therefor, and it would be inequitable and unconscientious towards all holders of stock in the company, after such great changes have taken place in the lapse of time, that complainants should at this day, set up claim to said stock, to the great injury and destruction of the rights of other stockholders, which would thereby be produced, and complainants are barred and estopped therefrom.

The statutes of limitation are pleaded, and that the great lapse of time, rendering impossible correct knowledge of facts at the present day, resulting from the death of all parties to those transactions, the laches of complaints, and the *bona fide* accrual of the large and valuable rights of the other stockholders render the bill a stale, inequitable and unconscientious demand, which ought not now to be heard in a court of equity.

Exhibit, just received at the time of filing the answer, was made, showing the transfer of certificates 10, 12, 28, to Ashbel Smith, prior to the death of White.

DISPOSITION OF THE CASE BELOW.

The Circuit Court having heard the case on bill, answer and exhibits, dismissed the bill and the complainants appealed to this Court. The questions involved in the pleadings are:

1. Have the plaintiffs the right to prosecute this suit as heirs at law of David White and Mary White?

2. Was the stock in controversy transferred by Lipscomb after the death of White, and, if so, is the company liable for his acts in this respect?

3. Is the company liable for the transfer by Lipscomb, during the life of White, of Certificates Nos. 33, 36 and 39 of Book C, from White's name to his own?

Note. The claim to these three shares is not urged in appellants' brief, and no point made in argument as to their transfer, and it does not, therefore, seem necessary to discuss this question.

4. Were White and Lipscomb partners or jointly interested in the stock placed by White in Lipscomb's hands for disposition?

5. Could not White's heirs or representatives have enforced

their rights, if any they had against Lipscomb in his life time, or against his estate after his death but for their own default, or but for causes with which the company had no connection?

6. Is not the alleged cause of action a stale demand and barred by laches or limitations?

Note. These are all the questions made by the pleadings; hence are all that can be raised on the evidence. Appellants' attempt in this Court to raise another question not made in their bill, and which, for that reason cannot be considered. Protesting against its consideration, we state it here as No. 7 and will discuss it in the course of the argument.

7. Were the endorsements on the stock and delivery of it by Lipscomb for the purpose of transfer a valid assignment though not in literal compliance with the deed of trust?

POINTS AND ARGUMENT.

Our first which controverts the 7th point in appellants' brief is as follows:

FIRST.—THERE IS NO CAUSE OF ACTION BY THE COMPLAINANTS AS HEIRS AT LAW OF DAVID AND MARY S. WHITE.

The suit is distinctly and solely in that right and capacity, and the issue was distinctly made in the answer.

The evidence shows that both David White and his widow made last wills, which were duly probated in Alabama, their domicil (Rec., 126, 212).

It shows an administration on the estate of David White in Texas, and an administration on both estates at their domicil in Alabama, and does not show any disposition of either of those administrations, no decree of distribution, nor to whom or how distribution was made, nor what was done in regard to said stock as to creditors, or otherwise (*Ib.*, 230–234).

We say, therefore:

I.—The proof and the allegations must correspond. They cannot recover as heirs at law, because the truth is that both their ancestors died testate as to these rights, if they existed.

II.—Not only were there wills, but there were administrations having full jurisdiction over the rights here claimed—to sell them—and to make legal distribution of the whole of the stock. They allege that White had personal property. Its distribution was within the jurisdiction of the Probate Court. That jurisdiction attached. How was it exercised? What amounts respectively were distributed in connection with other personalty, or realty? To presume that this was not done would be to pre-

sume that the Court violated its duty, or ascertained that no such rights existed. It is no case for mere presumption. If, consistently with that administration, rights could be shown, the allegations should be made. Jurisdiction of the Court in Alabama, having attached and existed, in entire want of allegation and proof on their part as to the proceedings of the said Courts, their case entirely fails to be made out by the mere simple naked proof of their relationship to David and Mary White. They show a state of case in which these rights could not arise—they could not possibly take, as heirs at law.

Suppose they had alleged specific provisions in the wills, bequeathing this stock to them, and effect given thereto by the decrees of the Probate Court, and brought their suit thereon, could they have recovered by proof of relationship, that would have made them heirs at law in the absence of wills? Most certainly not. And no more can they allege their rights as those of heirship, when the case shows that the property did not pass by heirship, but passed into administration, the character and result of which, or any disposition made by the proceedings therein of this property, are not shown.

III.—Administration not shown closed in Texas, nor any decree of distribution in Alabama, the cause of action in the U. S. Court in Equity is presumptively in a personal representative of the estates. See the case of same complainant against the Galveston City Company, 111 U. S., 170.

SECOND.—ALL THE RIGHTS OF THE COMPLAINANTS WERE CONVEYED AND PASSED TO ROBERT J. WARE.

This is specifically alleged in the answer. It does not relate to David and Clement White, who had no rights. The complainants are Mary B. Holtzclaw, D. P. Lumpkin and Thomas W. Cowles, grandchildren of David White, and Mrs. White, his daughter.

The evidence (202, 203) shows conveyance by Mrs. Holtzclaw and her husband, and by Lumpkin, June 18, 1869, as follows:

THE STATE OF ALABAMA, }
Montgomery County. }

Know All Men by these Presents:

That, whereas, heretofore we, the undersigned, as legatees and heirs at law of David White, did upon a valuable consideration release to R. J. Ware all right and interest in the estate of David White in all property in the State of Texas, and all interest we might have in said property as heirs at law or legatees of Mary S. White, widow of David White, we agree that Robert Y. Ware, executor of Robert J. Ware, may use our names as heirs of said White in any manner that may be necessary to secure said property, or the claim of said Ware as executor thereto, without incurring cost or ultimate liability in us. Given under our hands and seals this the 18th day of June, A. D., 1869.

Attest:
E. G. CAREW.
CHAS. T. BALLARD, JR.

J. T. HOLTZCLAW. [Seal.]
MARY B. HOLTZCLAW. [Seal.]
D. P. LUMPKIN. [Seal.]

their rights, if any they had against Lipscomb in his life time, or against his estate after his death but for their own default, or but for causes with which the company had no connection?

6. Is not the alleged cause of action a stale demand and barred by laches or limitations?

Note. These are all the questions made by the pleadings; hence are all that can be raised on the evidence. Appellants' attempt in this Court to raise another question not made in their bill, and which, for that reason cannot be considered. Protesting against its consideration, we state it here as No. 7 and will discuss it in the course of the argument.

7. Were the endorsements on the stock and delivery of it by Lipscomb for the purpose of transfer a valid assignment though not in literal compliance with the deed of trust?

POINTS AND ARGUMENT.

Our first which controverts the 7th point in appellants' brief is as follows:

FIRST.—THERE IS NO CAUSE OF ACTION BY THE COMPLAINANTS AS HEIRS AT LAW OF DAVID AND MARY S. WHITE.

The suit is distinctly and solely in that right and capacity, and the issue was distinctly made in the answer.

The evidence shows that both David White and his widow made last wills, which were duly probated in Alabama, their domicil (Rec., 126, 212).

It shows an administration on the estate of David White in Texas, and an administration on both estates at their domicil in Alabama, and does not show any disposition of either of those administrations, no decree of distribution, nor to whom or how distribution was made, nor what was done in regard to said stock as to creditors, or otherwise (*Ib.*, 230–234).

We say, therefore:

I.—The proof and the allegations must correspond. They cannot recover as heirs at law, because the truth is that both their ancestors died testate as to these rights, if they existed.

II.—Not only were there wills, but there were administrations having full jurisdiction over the rights here claimed—to sell them—and to make legal distribution of the whole of the stock. They allege that White had personal property. Its distribution was within the jurisdiction of the Probate Court. That jurisdiction attached. How was it exercised? What amounts respectively were distributed in connection with other personalty, or realty? To presume that this was not done would be to pre-

sume that the Court violated its duty, or ascertained that no such rights existed. It is no case for mere presumption. If, consistently with that administration, rights could be shown, the allegations should be made. Jurisdiction of the Court in Alabama, having attached and existed, in entire want of allegation and proof on their part as to the proceedings of the said Courts, their case entirely fails to be made out by the mere simple naked proof of their relationship to David and Mary White. They show a state of case in which these rights could not arise—they could not possibly take, as heirs at law.

Suppose they had alleged specific provisions in the wills, bequeathing this stock to them, and effect given thereto by the decrees of the Probate Court, and brought their suit thereon, could they have recovered by proof of relationship, that would have made them heirs at law in the absence of wills? Most certainly not. And no more can they allege their rights as those of heirship, when the case shows that the property did not pass by heirship, but passed into administration, the character and result of which, or any disposition made by the proceedings therein of this property, are not shown.

III.—Administration not shown closed in Texas, nor any decree of distribution in Alabama, the cause of action in the U. S. Court in Equity is presumptively in a personal representative of the estates. See the case of same complainant against the Galveston City Company, 111 U. S., 170.

SECOND.—ALL THE RIGHTS OF THE COMPLAINANTS WERE CONVEYED AND PASSED TO ROBERT J. WARE.

This is specifically alleged in the answer. It does not relate to David and Clement White, who had no rights. The complainants are Mary B. Holtzclaw, D. P. Lumpkin and Thomas W. Cowles, grandchildren of David White, and Mrs. White, his daughter.

The evidence (202, 203) shows conveyance by Mrs. Holtzclaw and her husband, and by Lumpkin, June 18, 1869, as follows:

THE STATE OF ALABAMA, }
Montgomery County. }

Know All Men by these Presents:

That, whereas, heretofore we, the undersigned, as legatees and heirs at law of David White, did upon a valuable consideration release to R. J. Ware all right and interest in the estate of David White in all property in the State of Texas, and all interest we might have in said property as heirs at law or legatees of Mary S. White, widow of David White, we agree that Robert Y. Ware, executor of Robert J. Ware, may use our names as heirs of said White in any manner that may be necessary to secure said property, or the claim of said Ware as executor thereto, without incurring cost or ultimate liability in us. Given under our hands and seals this the 18th day of June, A. D., 1869.

Attest:
E. G. CAREW.
CHAS. T. BALLARD, JR.

J. T. HOLTZCLAW. [Seal.]
MARY B. HOLTZCLAW. [Seal.]
D. P. LUMPKIN. [Seal.]

And conveyance by Thos. W. Cowles, as follows (p. 235):

THE STATE OF ALABAMA, }
Montgomery County. }

Know All Men by these Presents:

That whereas, heretofore I did, on a sufficient consideration, release to Dr. Robert J. Ware, now deceased, all reversionary interest that I then had in the estate of David White as the heir or legatee of Mary S. White, and any direct interest that I had in the estate of Mary S. White, and now authorize Robert Y. Ware, executor of Robert J. Ware, to use my name in any manner that may be necessary to secure the right of David White's estate in and to any and all property whatever, to which it has any claim or interest in the State of Texas, or elsewhere, without any cost or ultimate liability on me. Given under my hand and seal this the 19th day of June, A.D., 1869.

Attest: THOS. W. COWLES. [Seal.]
JOHN L. COBB.
JAMES Y. BROME.

Claimant and said White had no interest under the wills of either Daniel or Mary White in the Galveston stock (251, 260).

As to Mrs. Asenath Ware, the remaining complainant, the stock was personal property, and by the law of Alabama in 1841, when David White died, her interest therein, whether derived by his will or passing by operation of law, vested in her husband.

The appellants' reply to this is that Mr. Ballinger, who drew the answer had given an opinion that it was doubtful whether the plaintiffs take as heirs or devisees of David or Mary White, and that to avoid this question the plaintiffs agreed that their respective rights should be as heirs.

There is no rule of law that allows one to make himself or any one else an heir to another by contract where he is not such in fact. The law fixes heirship, and the right as such accrues immediately upon death of the ancestor. Any right to an estate derived by contract must be claimed accordingly in an action for its recovery. Appellants cannot claim in one capacity and recover in another. Appellee would be content to submit the above point without further argument, but allusion is made in appellants' brief to an opinion of Mr. Ballinger, who represented the company in the Circuit Court, and as Mr. Ballinger is now dead, it is but justice to him to give his version in full, taken from his brief filed in the Court below. The statement is a fair abstract of Mr. Ballinger's evidence as found in the record, and it is given for the above reasons, though quite lengthy. The references are changed to suit the present record.

"There are circumstances connected with these deeds requiring particular explanation. It will involve conflict of statement in my own deposition in this case and that of the witness Molton, but all such conflict settles itself by reference to the written record at the time.

"Molton, son in law of R. J. Ware and R. Y. Ware, executor of R. J. Ware, came to Galveston about April, 1869.

There were 14 lots out of the 32 lots purchased by White and Lipscomb in 1839, undisposed of by Lipscomb, in whose name the title has been taken—certificate of purchase given to Lipscomb—which was assigned by Lipscomb, and the lots subsequently re-conveyed to Lipscomb by the assignee; a partition effected in a suit of one of Lipscomb's vendees, and part of the lots vested in the unknown heirs of David White. The pressing, urgent object of their coming to Texas was to claim and obtain the benefit of all these lots for the estate of Robert J. Ware, subject to the rights of his widow, who would unite in any conveyance of them. The estate of Ware was represented to be valuable, but embarrassed by pressing debts, and relief from this source was necessary to save it. We were assured that none of the other heirs of David or Mary White had any interest in these lots—the three who had had interest under their wills, Mrs. Holtzclaw, David Lumpkin and Thomas W. Cowles—having sold all their right and interest to Robert J. Ware; and the other grandsons, Clement and David White having no interest under the wills. As to any rights of the grandchildren, the claims of Molton and Ware executor, and the employment of attorneys was entirely adversary. Molton testifies that the attorneys were employed equally and in behalf of all the White heirs, and it was left to us to decide as to their respective rights. The foolishness of this on its face is transparent. The result was, that before they left Galveston they had contracted to sell lots to the amount of $7,000 in behalf of Ware's estate, the title to be satisfactory to the purchasers.

"Molton sent conveyances from Lumpkin and Cowles to Robert J. Ware, which we pronounced sufficient, though not well authenticated for record. The conveyance by Mrs. Holtzclaw, we pronounced not sufficient to make good the title to the lots. Molton claimed that it was so understood, and that she set up no claim; that Ware was owner of all the interest in lots and in City Company stock of all the parties, and besides was a creditor of more than $50,000 against White's estate, which was wholly insolvent. Correspondence ensued as to how best to be able to make good title, and to make clear the right to the entire interest of those parties to the lots and stock. Our position was solely as their attorneys, and how the rights they claimed against the other heirs could be secured and evidenced. I advised dealing frankly and openly with them, and paying something, if necessary, to get clear conveyance. The result was that Molton obtained and transmitted to us the conveyances which we have copied, and that by administration on the estate of R. J. Ware, the joinder of his wife, all the above lots were sold, realizing $14,000, which was remitted from Texas to the executor in Alabama. The sequel showing the malappropriation of this money, and the embarrassment to the Texas ad-

ministrator, whilst indicating much as to the morale of the case is scarcely worth special discussion.

"Those deeds are on record, and form part of the title from the estate of R. J. Ware to the lots in which the White and Lipscomb stock was invested. Special attention is asked to the evidence of Molton in regard to these deeds. Speaking of his interview with me in Texas, which was in April, 1869, he says in answer to 37th interrogatory:

'It appearing in the investigation that some of the heirs of White had transferred their interest in his estate, and that of his wife and widow, to R. J. Ware, the said B. J. & M. were to assert the claim to the lots and lands, in whosoever names they considered best entitled under the law, and all the facts and papers of the case, and afterwards to satisfy purchasers of the same to the superiority of their title to that of any and all claimants' (p. 137, 138).

"I here insert the 44th Interrogatory to Molton and his answer to it:

'Forty-fourth cross-interrogatory: Are there any facts within your knowledge, or of which you have any information or tending to show, that whatever interest in all property in the State of Texas was devised to Mrs. Holtzclaw, one of the complainants, and to David P. Lumpkin, one of the complainants, by the will of David White, or the will of Mary S. White, or inherited by them or any of them from said David and Mary S. White, or either of them, was at any time ever conveyed or belonged to Robert J. Ware or his estate, or any representative thereof. Answer as to the interest of each of said parties. If you do know any such facts or fact, state the same fully. (*Ib.*, 143).

'Forty-fourth answer to the forty-fourth cross-interrogatory—He saith: There were in 1869 some papers purporting to be transfers to R. J. Ware by David P. Lumpkin and Mary A. Holtzclaw (and her husband James T. Holtzclaw). And shortly afterwards another such transfer found among Dr. Ware's documents from Thomas W. Cowles, three of the complainants, of their interests, respectively, in the estates of David and Mary S. White, of which three papers I left or sent to B. J. & M., transcripts from the records of Probate Court of Montgomery County, Alabama, and the originals I have not seen for several years, the same having been misplaced or lost. These are the three transfers described in my answer to thirty-seventh interrogatory as those on which Judge Ballinger gave the opinion that if they conveyed any interest at all (Dr. Ware being executor of White, and the consideration nominal, they would not in legal construction include the Galveston City Company stock interest, the same being at the time of said transfers unascertained and unknown to the heirs of White, and not in the eye of the parties to the transfers).

'Forty-fifth cross-interrogatory: Have you stated that you do not know any such fact, or facts, as referred to in the last preceding interrogatory?

'Forty-fifth answer to the forty-fifth cross-interrogatory—He saith: I have said that I know the facts stated in this interrogatory, modified by my explanation thereof, in answer to last interrogatory.'

"The true state of the facts, as shown by the evidence, is, that when Molton was in Texas, he had no conveyances from these parties at all. He alleged that they had no right or interest whatever in the Texas lots or stock. When he returned to Alabama he sent on the conveyances which these parties had made to Robert J. Ware, acknowledged in our letter June 5, 1869. See p. 251. We wrote that the conveyance by Lumpkin & Cowles were sufficient to show that all their interests had been sold to Ware, but they required legal authentication, but that we did not think the conveyance by Mrs. Holtzclaw was

sufficient. Molton annexes to his deposition our letter of June 5, 1869, and we make extract from it:

'Can you not get from Mrs. Holtzclaw and her husband, such a conveyance, and with the chances of recovery from the City Company, is it not best *now* to make the effort and to get it, and to pay something for it? That seems to us the cheapest and best way for you to proceed, especially if it be her understanding that her interest has been heretofore transferred to R. J. W.' p. 216.

"It was after this objection to her previous conveyance, and suggestion to get conveyance, which would clearly convey the lots and the stock that the deed from Holtzclaw and wife was made and obtained. It bears date, the *18th of June*, 1869. It is without any foundation that I ever expressed the opinion that the deed of 18th June, 1869, would not convey the stock. At a later day I suggested that if Ware's estate should effect a large recovery from the City Company for stock, then worth near $10,000 per share, they might apprehend controversy from these parties as to whether their intention was to include in these sales the interests in Texas. This was careful precaution and suggestion on our part.

"Molton replied that 'they do not claim the remotest interest, present or future, having in fact and in intention, sold to Dr. Ware all claims whatever and anywhere,' and that the property in Texas was 'clearly mentioned' (217).

"The original conveyances of the other parties I thought sufficient, but one of them had been lost, and Molton obtained a new conveyance, such as appears. In the face of our express answer, alleging conveyance of all their right and interest, and of the filing of these deeds as evidence, no explanation is attempted, except Molton's denial of their existence altogether, and answer to the interrogatory by reference to the original deeds as the only deeds ever made which is disposed by the witness."

Point II.

Share No. 108, Book A, issued to White, November 7, 1838, and claimed in the bill as having been transferred by Lipscomb after White's death, was transferred by White himself November 12, 1838, to John Rugely and was renewed to Rugely July 6, 1854 (Rec., p. 40, 56).

Point III.

Shares Nos. 10, 12 and 28, Book C were transferred during White's life to Ashbel Smith, and share 27 was not transferred after White's death, as alleged in the bill. This controverts appellant's 3d point.

Each of these certificates bears endorsement: "I assign the within certificate to Ashbel Smith—David White per Abner S. Lipscomb, attorney in fact" The endorsements on 10 and 28 are witnessed by B. F. Tankersly, Geo. H. French, on 12, by William Little, P. J. Latham, B. F. Tankersly, Geo. H. French. They were surrendered for new stock by Ashbel Smith, 5th March, 1845 (59, 61).

The question is, at what date did Smith become their owner, or rather, at what date had Lipscomb indorsed and transferred these shares? There is no scintilla of evidence that it was subsequent to White's death, Dec. 10, 1841. The argument of complainant is that a receipt was found among Lipscomb's papers in his hand writing intended to have evidenced a transaction between him and R. J. Ware, executor of White, if Lipscomb had met Ware, which he did not do, as follows,

"WALNUT BLUFF, TEX., Jan. 9, 1844.

Received of Abner S. Lipscomb four shares of Galveston City Company Stock, and an order on James Love, Esq., of Galveston, for sixteen shares more, which order, if paid, will make twenty shares of stock belonging to the estate of David White deceased."

In the first place, the paper is not evidence in their favor. An unsworn writing of this character made by a stranger, never executed, explained only conjecturally, annexed to a deposition of their own witness and not seriously claimed to be evidence. Let us, however, analyze it. "Received of Abner S. Lipscomb *four shares of Galveston City Company Stock.*" The argument is, that this must have been trustees' stock, and stock which issued to David White, and as there were no other 4 shares of White's trustee stock to which it could relate except these, therefore it must relate to these three. What logic! Lipscomb at that time owned six shares standing in his own name (p. 68). Part of the complaint is that he had wrongfully renewed three shares of White stock in his own name. It is apparent that he had no reference to the existence at that time of the original White stock *in specie*; that the 16 shares by Love were to be "*paid*," that the title to all the shares were then or had been previously vested in Love, and the inference that these three shares were then White's trustee stock in Lipscomb's hands is not only most forced and unnatural, but is positively untrue. It is, however, the whole of plaintiff's case as to these shares. Against it, to show that Lipscomb, as attor-

ney of White, had transferred the certificates prior to White's death, December, 1841, we have the positive evidence of Ashbel Smith, a gentleman whose name is most honorably historical in the country. He states that he never owned but these three shares of stock in the City Company, and one other. That in 1840 he bought two lots from General Memucan Hunt, and to pay for the same he bought these three shares of stock. Further evidence in the case is that at a sale of city lots General Hunt was a large purchaser, but only obtained titles from the company as payment was made in stock (95).

Smith testifies:

I transferred the three certificates just shown to me, on, or before the 10th of July, 1840, to Gen. Memucan Hunt, in payment for two lots in the city of Galveston, block 499, lots 8 and 9; the certificates, in the transaction between Gen. Hunt and me, were rated at $500 apiece, in Texas money; the whole transaction of purchase and payment was completed at the time. Gen. Hunt asked me for the lots, $1,500, which he said was the cost of them to him. He said that I could pay in three shares of Galveston City Company's stock at $500 apiece, which three shares, in payment. I so delivered him. I do not remember from whom I bought the three shares; they had on them the endorsement of David White, by Abner S. Lipscomb, attorney in fact. I knew Lipscomb at that time, intimately, as the word intimately is commonly understood. I knew his handwriting, and was satisfied then, and now, of the genuineness of his signature on the back of the certificate. I delivered the certificates to Gen. Hunt in payment for the lots, with my endorsement on them in blank.

Question—Did you, or not, have any impression or understanding at the time, that the mode of the transfer of the certificates to you, and by you by endorsement in blank, was not sufficient to pass the title to the certificates, or was, in any respect, irregular?

Answer—I believe that the transfer was regular and customary.

I paid the current value for the certificates at the time, but do not recollect the amount. The title of the lots is from the City Company to me, and is dated the 10th day of July, 1840. I have owned the lots ever since, and own them at the present time.

My impression and understanding at the time, was and is now, that Gen. Hunt had purchased the lots from the City Company, and that the title was made to me by the City Company, by his, Gen. Hunt's, order.

I built on the lots in 1840 and 1841, and resided there. In March, 1842, one of houses was occupied by Gen. Houston as his executive office.

I have traded very little in personal estate, or real estate. I have never in any way, been a speculator in lands of any kind. I think, in all my business transactions, I have aimed to be particular and careful to do business in a business way, and not to do it loosely.

My statement in regard to the certificates, and the use of them in payment for the lots, is not at all doubtful, but is entirely positive, both as to the numbers, as to the party to whom delivered, and as to the general date of their delivery.

Except one other lot bought from Gen. Baker, I never owned any other real estate in the city of Gavelston, and, except one other share of stock in the Galveston City Company, I never owned any other, except these three.

I never had the least interest in the certificates which issued in renewal of these three shares of stock, nor had I any interest in these certificates after the delivery of them to Gen. Hunt. I have never had any interest in the original certificates, nor in the certificates issued in the renewal of them after the delivery of the original to Gen. Hunt. Whatever was done for the renewal or transfer of renewed certificates was done without any interest on my part, and for the accommodation parties in interest. (160, 161.)

It is apparent that Lipscomb, as attorney for White, had sold and indorsed these certificates, in blank, previously. If a

doubt could exist whether this indorsement took place prior to White's death, December, 1841, other evidence in this case is conclusive of the fact. We have seen that the witnesses to the signature of Lipscomb, as attorney of White, to No. 12, were William Little, P. J. Latham, B. F. Tankersly, George H. French. Pages 56 to 65 of the evidence in the case, deposition of Cole, is a copy of the indorsements on each and every share of the David White stock. Book C. No. 11, the indorsement is as follows: "Galveston, 8th August, 1840. For value received we hereby transfer and make over the within share of stock to the Galveston City Company. David White, per Abner S. Lipscomb, attorney in fact"; to which are the same four witnesses, signing precisely in the same order, William Little, P. J. Latham, B. F. Tankersly and George H. French. This certificate, No. 11, was surrendered to the Galveston City Company, in its hands, and cancelled Aug. 8, 1840--(See plaintiff's evidence, exhibit B, p. 48, 49.)

I believe that efforts have been made to bring the question of probabilities within some region of mathematical calculation. What the probabilities would be that four persons would sign as witnesses to a document, August, 1840; and the same precise four persons would sign as witnesses to a similar document subsequent to December 10, 1841, in identically the same order, I do not know. It would require logarithms to work it out. That your honors will doubt that the indorsement of certificate No. 12, was made on the same day with that on No. 11, I am unable to have a a misgiving Not only No. 11, but No. 13 and No. 24, were witnessed in the same exact manner, and surrendered to the company April 8, 1840. (48, 49, Exhibit B.)

Nothing, I think, could add to the conviction that the indorsement and transaction as to No. 12 was the same identical date.

Nos. 10 and 28, Book C, assigned to Ashbel Smith, are witnessed by B. F. Tankersly and George H. French. The proof shows the same witnesses, in the same order, to the indorsement of the transfer of No. 14, which was surrendered to the company, January 7, 1840; No. 15 which was surrendered to the company and renewed to McKinney & Williams, November 2, 1841; No. 16, surrendered to the company January 7, 1840; Nos. 17, 19, 20, 21, 22, 23, 29, same witnesses, surrendered to the company January 7, 1840; Nos. 24 and 25, indorsed without date, same witnesses, presented to the company by the holder, and renewed to him May 24, 1841.

If the evidence of Col. Smith needed corroboration, we thus have it in the most conclusive shape, showing the time of the indorsement and transfer of these certificates by Lipscomb.

When we take into consideration that the certificates of stock were practically treated as commercial paper, and when

endorsed in blank passed from hand to hand without the necessity of further endorsement, and that above the blank endorsement the holder could write anything he choose, it becomes clear that the fact that. "March 5, 1845," appears above Smith's name, is entirely consistent with his testimony, to the effect that he parted with the ownership to Hunt in 1840. He says he knew Lipscomb's signature that was upon the certificates when he bought them, and that was enough for him. Smith delivered them to Hunt, in 1840, in payment for lots bought from the latter. On March 5, 1845, when the certificates were surrendered for new stock, Smith's endorsement was enough to authorize the company to issue the new stock to him; and this stock being transferable only upon the books of the company, it was necessary for Smith to make the transfer or leave his power of attorney to James or some one else to make the same. This theory is entirely in keeping with the practice of the company, wholly consistent with Smith's testimony, which is positive to the effect that he parted with the ownership of the stock in 1840. He might have had no certain memory as to the exact date of the transfer independent of the transaction with Hunt, the date of which he remembered exactly; but that evidence is always convincing which establishes a date by a contemporaneous fact well fixed in the memory of the witness, and the date of which is clearly proven. Before closing this point, we call the Court's attention to misstatements of Dr. Smith's testimony, found in appellant's Brief.

He did not say, as alleged on p. 32 of their brief, that he had never owed a debt in his life—at least this is not to be found in the record. Neither did he say or show that he had no recollections of the facts other than what the books show; for his recollection as to the time was different from what the books showed. He had no recollection as to the surrender of the stock, or indeed of anything that occurred in reference to it subsequent to its sale to Hunt in 1840, for the very sufficient reason given by himself, that after that time he had no interest in the stock, and he did not charge his memory with business matters in which he had no interest.

We cannot leave this subject without protesting against appellant's counsel, citing the argument of their witness, Moulton, agent for the complainant, as evidence in this cause. It is true that the argument was made in answer to interrogatories, but no witness can inject into his evidence an argument drawn from the papers before the Court. It is the province of the latter to form its own conclusion from such papers.

As to certificate No. 27, Book C. there is no date to its endorsement, but it has the same witnesses to its transfer as are found to Nos. 14, 15, 16, 17, 19, 20, 21, 22, 23, 24, 25 and 29, none of which are claimed in this suit, and all of which were

surrendered to the company long before White's death, and were necessarily transferred before their surrender. The claim of appellants is that this No. 27, together with the three Smith certificates, are the only four that could have been referred to in an unsigned document in Lipscomb's handwriting found among his papers after his death. We have shown beyond doubt that the three Smith certificates could not have been referred to, and this destroys all possibility of No. 27 constituting the fourth certificate.

Point III.

Sixteen certificates, viz.: 116, 118, 119, 120, 121, 122 and 124 out of Book A and No. 34, and from 42 to 49, inclusive, out of Book C, were lawfully transferred by Lipscomb, as attorney in fact for said White, before White's death, and the title thereto passed out of White on that day.

ARGUMENT.

The allegation in the bill is that these certificates were transferred by Lipscomb, after the death of White, in favor of his heirs, and with the connivance of the company. The main argument of appellant's counsel seems to be an effort to show that complainants should have recovered because these certificates were transferred in a different manner from that provided in the deed of trust, which is a question not raised by the pleadings. We take it that the evidence upon which it is sought in equity to set aside a conveyance for fraud or otherwise, must correspond with the pleadings; that a complainant cannot claim relief in his bill upon one ground, and, upon trial, claim it for wholly different reasons. Stearn *vs.* Page, 7 How., 829. It is not alleged that the stock in controversy was transferred in an unlawful manner, much less that this was fraudulent or worked any injury to the complainants. The sole grounds of complaint in the bill are that three of the certificates in suit were transferred by White's attorney to himself, and that the whole 24 were transferred by Lipscomb after the death of White.

We will, however, discuss the point hereafter, making it the last point in our brief. On the back of each certificate is its endorsement by Lipscomb, as attorney in fact for White, in blank, *bearing date July 1, 1841;* witnesses to it,

---

This controverts appellants' Second Point.

Levi Jones and John P. Borden. Beneath is the endorsement in blank, James Love (pp. 62, 65). Plaintiff's contention is, that these certificates remained in the hands of Lipscomb, and were not endorsed or delivered by him until March 4, 1842. The only evidence of this whatever is that Molton proves that among the papers of Judge Lipscomb was found a receipt in these words:

"I have received this day from A. S. Lipscomb thirty shares of Galveston City stock, which I promise to return to him whenever thereto requested, value received (123).

"March 4, 1842. JAMES LOVE."

Also the following paper in Lipscomb's handwriting, not signed, but alleged to have been intended for a transaction with, and signature of, J. R. Ware, executor of White, but their meeting was prevented by high water.

"WALNUT BLUFF, TEXAS, January 9, 1844.

Received of Abner S. Lipscomb four shares of Galveston City stock, and an order on James Love, Esq., of Galveston, for sixteen shares more, which order, if paid, will make twenty shares of stock belonging to the estate of David White—" (123).

It is sufficient to say, with respect to these papers, that there cannot be the slightest pretense that either of them is legal evidence or admissible for any purpose whatever, or that they are entitled to consideration at the hands of the Court. We can imagine no ground on which a lawyer could contend before you that they have any character or effect as evidence, and we believe that the Court, in its decision, will not give them any such effect.

Let us treat them, however, as legal evidence. The history of these several shares, as respects the defendant company, is that on the 4th of March, 1842, these certificates containing the above endorsements by Lipscomb, dated July 1, 1841, and by Love, in blank, were presented to the company by Love, and renewed to him March 4, 1842 (49).

116 was transferred by him February 15, 1844; 118, 119, 120, 121, 122 were transferred by him September 30, 1842; 42 to 45, Book C, were sunk by Love with the company for city lots, April 27, 1854; 46 was sunk August 5, 1845; 47, July, 1845; and 48 was transferred July 24, 1845 (*Ib.*).

The complainants strenuously insist that the receipt of March 4, 1842, evidenced a mere deposit of 30 certificates with Love, to be returned *specifically* to Lipscomb whenever called for—no intention to transfer or vest any title to them in Love—and that Love's taking title in his own name was a breach of trust by him, for which the company is responsible. This theory will not bear examination. Eight shares of trustee's stock, three of them White stock, and five others not White stock, had been surrendered to the company by Lipscomb, and

a renewed certificate, No. 274, issued to and in Lipscomb's name for the entire eight shares. These eight shares were undoubtedly included in the transaction. But Lipscomb did not deposit or leave this certificate with Love, to be *returned* to him. March 4, 1842, he transferred the certificate on the books of the company to Love, which was the mode of dealing with the renewed certificates (*Ib.*, 69), and on the same day new and separate certificates were issued to Love, to be taken as part of the same transaction. The title to the stock was thus completely divested out of Lipscomb, and vested in Love. There can be no other reasonable conclusion than that the only purpose was to invest title in Love, and to enable Love to use the stock as his own. Love not only possessed his confidence, but was recognized as wealthy, and a large holder of the stock of the company. On what precise negotiations or calculations or on what former dealings the transaction was based is now impossible to be known, and is wholly conjectural. Lipscomb is shown not to have had confidence in the future of Galveston. He invested Galveston City Co. stock in a projected town up the bay at Edwards' Point (*Ib.*, 201), in Velasco (122), and other points. No doubt there were business motives and expectations on both sides. Any other supposition would be trivial and meaningless than that the title to all the stock had been or was vested in Love for his use and disposition.

As to the sixteen shares trustee stock surrendered by James Love, and new certificates renewed to him March 4, 1842, certain facts are clear. The first is, that they were endorsed and transferred July 1, 1841, by Lipscomb. That date was written at the time. We have the positive evidence of Cole that no change had been made on any certificate since he had been agent, in 1854 (66, 67). We have the positive evidence of John P. Borden, surviving witness, to the signature of Lipscomb (the first Commissioner of the land office, and a lawyer), that he would not have signed with a false date; that he has no doubt from the appearance that the date was the true date of the endorsement, and that when all the certificates but one of them was surrendered, he acted as agent in receiving the certificate and renewing the stock, and if there had been any alteration he would have observed it, as only a few months had elapsed (155, 157).

The maxim of the law is, *omnia rite esse acta;* and, considering the actors, it would be difficult to imagine a case in which the maxim was more applicable. Where the usage was to pay certificates of the Treasury Department on endorsements in blank, C. J. Taney said: "The certificates in question were endorsed in blank by the appellant, and that endorsement would be altogether useless and unmeaning unless made for the purpose of transferring the property." (Baldwin *vs.* Ely, 9 How., 599.) That there was a transfer of these certificates made by

Lipscomb July 1, 1841, is obvious. To whom, and for what consideration, or why made, at this distance of time, it is impossible with certainty to say—the all-sufficient reason why Courts refuse to entertain cognizance of such ancient matters. The most probable solution is, that the transfer was then made to Love. On what negotiations, for what consideration or purpose, would be the merest conjecture.

On the 4th of March, Lipscomb transfers to him other eight shares, renewed to him in certificate No. 274, that we have traced. This makes twenty-four shares, leaving still six other shares to make up the thirty, but which we know absolutely were no part of the White trustee stock, at that date, in existence. If part of the White stock at all, they had been delivered to Love, and surrendered by him to the company, and property obtained for them, long previously.

Exhibit B, part of complainant's evidence, the Historical Record of the White stock (49), shows that twelve other shares of the White stock had been surrendered by Love to the company and cancelled, and property obtained therefor as follows: Book C, Nos. 14, 16, 17, 19, 20, 21, 22, 23, 29, on the 7th of January, 1840; No. 32, August 15, 1840; Nos. 31 and 40, by Love & Groesbeck, October 19, 1840; making ten shares by Love and two by Love & Groesbeck. There is no trace of any stock with which Lipscomb's or White's name appears connected in the records of the company, to make out the other six shares to amount to the thirty. The only possible explanation therefore is, that on a settlement of all their stock transactions between Lipscomb and Love, commencing as far back as January 7, 1840, down to March 4, 1842, when Lipscomb transferred to Love the eight shares of stock, Love became due to Lipscomb thirty shares of stock. What took place on that date to produce this result, how far prior sales may have been cancelled, or previous negotiations modified, or future conditional sales or agreements made, we are wholly ignorant. The substance of the receipt was an acknowledgment of obligation by Love to Lipscomb for thirty shares of stock. True, the phrase is, "received this day." But we know positively, mathematically, that the thirty shares were not received that day—a large proportion of them, how many we do not know, had been cancelled for more than two years in the office of the City Company. There is, then, plainly nothing whatever in the receipt which, in any degree, varies the evidence of the endorsement and delivery of the sixteen shares to Love, or to some one from whom Love obtained them, on the 1st of July, 1841.

It is obvious and positive, then, that thirty shares of stock were not delivered to Love by Lipscomb, March 4, 1842, but that it was a settlement then made of their stock transactions, running back years, and of Love's obligation for stock. It was no mere deposit, *commodatum*. It was a con-

tract between lawyers acknowledging a consideration "*for value received.*" What negotiations, projects or schemes, were at the bottom of or connected with it, we know not. Lipscomb subsequently sold fourteen shares to Love, when, for what, we know not. No trace of it except the single memorandum which they produce from Lipscomb's papers. Nothing relating to it in any way the office of the company. Why the fourteen, and not the thirty, we know not. It is all the time to be borne in mind that these fragments (miscalled evidence) have been alone given to us from all that could be culled and picked from the papers of Lipscomb, and the papers of Ware, during relations between them of many years of the most important and intimate business character. A. F. James and D. C. Giddings ransacked Lipscomb's papers to find everything tending to a liability on the company in 1858. Lipscomb's estate brought suit against the company for supposed interests in stock. The counsel for the complainants in this bill based on charges of fraud and wrong destructive of the reputation of Abner S. Lipscomb, obtained the papers of Lipscomb's estate on their idea that the interests of that estate were to be promoted by this suit. That there must have been correspondence between Lipscomb and Ware when the latter failed to reach Walnut Bluff, and the former had the papers ready for the settlement, giving full explanations of all affairs between Lipscomb's and Ware's estate, would seem to be as certain as anything which could be inferred in the affairs between men. Upon these selected fragments, however, these facts are plainly tangible as if now in our sight:

1st. That dealings had occurred between Lipscomb and Love in White stock, commencing, certainly, as far back as January 7, 1840, when Love presented to the company certificates 14, 16, 17, 19, 20, 21, 22, 23 and 29 out of Book C, and obtained city lots for them.

2d. That Lipscomb made transfer of the 16 shares on the 1st day of July, 1841.

3d. That on March 4, 1842, Lipscomb positively did not deliver 30 shares of stock to Love, and the receipt then given evidenced the obligation growing out of past transactions, as well as those of that day.

4th. That the only delivery of stock by Lipscomb on that day of which we have evidence, is the 8 shares in certificate No. 274 which he that day transferred to Love.

5th. That, so far as said receipt refers to other White stock, it had been transferred by Lipscomb in 1840 and July 1, 1841, and there is no scintilla of evidence to show that the transfers of them by Lipscomb were made at any later time.

6th. To *attribute* the transfers to a date subsequent to White's death, and thereby to involve a breach of trust and illegality, would be contrary to the cardinal principles of law.

7th. And would be repugnant to the presumptions of consistency with the intelligence, sense, discretion and conformity to common business usage which the law indulges in men's affairs. Lipscomb was a lawyer, Love was a lawyer, Borden was a lawyer. White's death, March, 1842, must have been of notoriety among all those prominently connected with the City Company. The stock was then of but little value.

8th. And would be, after so long a lapse of time, neglect and laches, when valuable rights would be overturned, and claims neglected, result in great speculation, violative of the most fundamental doctrines of equity.

Mr. Ballinger testifies:

I had several conversations with him about the White stock he had received from Lipscomb, some of which were before and some subsequent to my employment in the City Company in the Lipscomb and Groce cases, the effect of which left no doubt on my mind that the allegation of transfer of the stock after White's death to him could not be proved by him (p. 223).

In answer to cross-interrogatory:

I obtained the impression from Judge Love that the receipt given to Lipscomb, covered stock previously received, as well as at the date, and that the date on the back of the trustee's certificate showed the date of their transfer, and that Love would have settled with Lipscomb, but for the difficulties between Lipscomb and Ware (247).

Note.—Appellants make no claim in this Court to certificates Nos. 33, 36 and 39, Book C, though claimed in their bill on the grounds that they were surrendered to the company by Lipscomb Dec. 3, 1841, and new shares therefor issued to and in the name of Lipscomb the same day—seven days before White's death—that this was a transfer by Lipscomb to himself, not authorized by his power, and therefore absolutely void, and the company to this day bound to make good the stock to White's heirs.

We presume the Court will not consider a claim not urged in the Brief, though made in the pleadings. However, we will consider these certificates, especially as some of the argument in reference to them is applicable to all the others, and we make the following point with reference to them:

Point IV.

APPELLANTS SHOW NO TITLE IN THEMSELVES TO CERTIFICATES NOS. 33, 36 AND 39, BOOK C.

The certificates in the hands of the company all bear the

same indorsement identically.—"Abner S. Lipscomb, attorney in fact for David White."

No date of indorsement. A new certificate including these three and five other shares was issued to Lipscomb by the company Dec. 3, 1841, No. 274. The other five shares had been issued by the company out of book E, the book containing the stock which went to the Virginians, to John R. Triplett (69). In the answer to the bill, it is alleged, that it does not admit, nor does it follow, that the transfer of the three shares of stock was made on the 3d of December, or first made to the City Company. It may have passed through any number of hands. The stock, being indorsed, passed by delivery. Public sales of lots had taken place. The case of Hunt shows that parties had become large purchasers, to get titles on payment, which, as the bill and answer concur in showing, was to be made in stock. At the date of White's death, as we have conclusively shown, every one of his sixty-seven shares of stock had been transferred, no doubt a controlling reason for which was Lipscomb's unfavorable opinion of the prospects of the growth and success of Galveston. The White stock was 67 out of a total 1,000 shares, constituting a very large proportion of the capital which had been employed in dealing in Galveston property. Billingslea says, in December, 1840, 490 shares of stock had been extinguished. (P. 120.) The number was much less the year previous; and the White stock was a very large share of it. Lipscomb was a man of ability and energy, of impaired fortune, who had come to Taxes to improve his fortune, mainly induced by his partnership interests with White and Galveston. We see that on his own account he had acquired five shares from Triplett, and five shares from the company direct. That he should again have acquired some of the stock, which during two years he had sold and endorsed to other parties, is not at all improbable, is wholly consistent with the record, and would be presumed by law rather than presume fraud or illegality, especially after long lapse of time, and to the prejudice of other rights.

About one-half of the sixty-seven certificates were indorsed in blank by Lipscomb. It is evident that the filling up of most of the others was made by holders after the endorsement. Any of these shares might have been acquired by Lipscomb subsequent to his transfer of them, and yet, because surrendered to the company by him, there would be equal evidence of his transfer of the certificate to himself, although the rights of other parties had intervened, with whom he was free to deal. Manifest as this is from the record, no mere inference or assumption of facts will be made, in order to set up the illegality which plaintiffs allege.

One of the exhibits by complainants to Molton's deposition, is a statement by David White, December 4, 1838, showing

joint interest of Lipscomb and himself in 56 shares, of which *Lipscomb had received five shares.* The five shares of White stock which Lipscomb had received, are not fully known to us. If it be true, as the bill alleges, that Lipscomb did appropriate or transfer to himself the three shares in question, they are the only three shares of White stock, out of the entire 67, of which it can distinctly be alleged that this was the fact on the 4th day of December, 1838. We do not know what other two may have been referred to. The entire 67 are before us for examination. What shares have any indicia, or appearance, or is there a scintilla of evidence to allege its appropriation by Lipscomb? The only answer is, Lipscomb had renewals made to himself of 33, 36 and 39, out of Book C. But the record shows that White himself recognized and ratified his receipt or taking, or appropriation of five shares. He had a right to them. When he had them renewed subsequently, what he might do with them was immaterial. After this lapse of time, no mere naked presumption will be indulged that there were other shares, which we know nothing about whatever, appropriated, which was done legally, but that this appropriation, which is the only one we know anything about, was fraudulent and wrongful. The evidence shows that on the 22d of April, 1839, the directors of the City Company passed an order to sell 22 lots in the city of Galveston to Lipscomb and White for $22,000 in stock, valued at $1,500 a share (71). The purchase was consummated August 29, 1839 (49). The lots were selected by White himself (122) In payment for same, eleven shares of White's stock were sunk, and five shares of stock which were the individual property of Lipscomb. Upon the theory of joint interest between the two in the White stock, it is evident that Lipscomb was entitled to reimburse himself these five shares out of the White stock. If it should be caught at, that here we find the five shares which White alluded to, we reply no, the plain idea is that Lipscomb had received 5 shares on his own account and not that of the partnership, and the further very conclusive answer is that the five shares of Lipscomb stock were not issued by the company until April 21, 1839 (49). And as Lipscomb had not himself acquired them, and as they were not in existence, they could not have been alluded to by White on the 4th of December previous thereto. Five other shares conveyed or renewed to Lipscomb by Triplett, also subsequent to December, 1838, could not have been referred to.

We say, then, that it is apparent from the record, that, leaving out of view the right admitted by White in December, 1838, to five shares of his stock by Lipscomb, individually, and to these three shares being a part of the five, that at most, what was done by Lipscomb, was, having used five of his own shares of stock in the purchase of Galveston lots, he replaced three of them with White stock.

We are not to be understood as recognizing any obligation on our part to show the exact precise facts which actually caused and justified Lipscomb to take title in himself, December 3, 1841, to three of the shares which had been issued to David White November, 1838. We simply exhibit in the record a state of facts, rendering it perfectly consistent with right and duty and equity that he could do so. This will be satisfactory and conclusive to the Court. It will most certainly not go outside of such facts to presume fraud and wrong. Lipscomb acted in the face of David White, then living, with whom he was most intimate; and had, in common, large interests, and possessed his fullest trust. He acted too under the scrutiny of the officials of the City Company with every motive and interest to guard against the liability of the company for double issues of the same stock. The thing in value did not exceed a few hundred dollars, good money. It occurred nearly forty-four years ago. No one is living in any wise connected with the matter. The record shows that in 1843 the exact information was given by the agent of the company, Gail Borden, to Billingslea, agent of Ware, executor to White, who turned it over to Ware—that these identical certificates were surrendered by Lipscomb and renewed—the party surrendering being of course the party to whom renewal was made (p. 48). In the statement of the White stock furnished by Cole, August 21, 1854, it was expressly shown that these shares of White stock were renewed to Abner S. Lipscomb, December 3, 1841. The exact fact then was reported by the company to White's executor about a year and a half after White's death, and continued to be reported. There is then no foundation for the statement that there was concealment by the company, or any recent discovery, as to these certificates.

Molton attempts such an excuse as this: "For aught we knew *David White had personally assigned* said certificate to Lipscomb." Facts recognizing such assignment are shown. But if it is meant that there was an intimation by the report of assignment by White appearing on the certificate, the reverse is the fact. The report from the company's agent, June 23, 1843, distinctly stated that "the business had been done by Judge Lipscomb by power of attorney from D. White" (p. 51). We repeat that there is no burden of proof on us to show the right of Lipscomb to make these transfers. In DeWitt *vs.* Miller, 9 T., 246, after the lapse of only twelve years, Chief Justice Hemphill said:

> "Time has thrown its darkening shadows over the transaction, and he who requires the Court to grope through the obscurities of the past for the protection of his rights must show reasonable diligence and that it has not been through his laches or neglect that the matter has now become involved in mystery or obscurity."

In Tinnen *vs.* Mebane, 10 T., 250, in which the heirs of a daughter sued the estate of the father for a legacy to her which

had come into his hands as her guardian, how suggestive is the language of the same Judge.

"Father, daughter, husband, all are dead; none survive to speak the transaction, and explain perhaps in a few words that which is now involved in obscurity."

In Smith *vs.* Hampton, 13 T., 459, he again said: "Where time is suffered to elapse and throw darkness over the transaction, *the presumption is* that some other arrangement has intervened by which former agreements have been annulled." etc. The principle governing the Courts of Equity is strongly illustrated by Judge Lipscomb, speaking for the Supreme Court of Texas in Cordova *vs.* Smith, 9 T. 146, citing with approval the language of Chancellor Dargan, of South Carolina, that in order to protect a possession of twenty-five years "the court should presume the appointment of an administrator, presume a sale by the administrator, and, in fact, presume almost anything." It may be added that Lipscomb's control over the stock was in no degree increased by the transfer. To impute fraud or wrong to it, would be wholly gratuitous and groundless.

Point V.

WHITE AND LIPSCOMB WERE PARTNERS IN THE WHITE STOCK OF THE GALVESTON CITY COMPANY; AND LIPSCOMB HAD THE AUTHORITY OF A PARTNER TO CONVEY THE SAME BEFORE AND AFTER THE DEATH OF WHITE.

If this be true, it is of course decisive of the whole case, without anything more. A brief explanation of the history of the stock and the parties connected with it, is proper to this point.

The Republic of Texas granted the league and labor of land on which the city of Galveston is situated to M. B. Menard on the——of December, 1836, at the price of $50,000, which Menard was to pay in acceptances by David White, agent of Texas, at Mobile, Ala. (241).

White, at once, made a bargain with Menard, furnishing his acceptances for the $50,000 (119), and for a commission of 10 per cent. on the sale of all lots in the contemplated city, taking a mortgage on the property for security. Not long after, White set up a claim to sell out the property in Mobile in shares of stock for whatever he pleased, and thus organize the Galveston City Company, adopted his programme therefor, and proceeded to make sales of said stock. Menard denied

White's authority for this, and in Richmond, Va., executed a conveyance and agreement with Trustees Jones, Green and Johnson for the issuance and sale of stock, and the formation of a company by the stockholders (33). This instrument gave Menard certain powers of settlement with White, and contained certain recitals, which led to the suit of Scott *vs.* The Galveston City Company, 42 Texas R., 535, by the holder of a share of stock issued by White in Mobile, claimed to be *ipso facto* one of the shares recognized in the trust deed, or that such a partnership and trust was created as entitled its establishment as valid stock of the company. The Supreme Court decided that it was not stock of the company, and that the claim was stale and barred. White's lawyer in Mobile to maintain his claim was Abner S. Lipscomb, who had recently resigned as Chief Justice of Alabama and removed to Mobile to practice law (165, 166, 169). When the company was set on foot by Menard and his associates, Lipscomb made one or more trips to Texas in pursuit of White's claims, and the result was the issuance to White of the stock received by him in the City Company, the payment by Menard of a large amount of money, and an obligation for a further large amount (117). White was considered a man of wealth, in large operations in Alabama; Lipscomb was much impaired in fortune; and the further result was that Lipscomb resigned as a member of the Alabama Legislature and removed to Texas—became Secretary of State of the Republic, aided to frame the State Constitution, and was a Justice of the Supreme Court from its organization to his death, in 1856 (103, 166, 167). Lipscomb had charge of this claim against Menard, and also charge of the settlement of a large balance due by White to the Republic of Texas.

The defendant alleges in its answer that White and Lipscomb were partners in the stock, which is the subject of the suit.

The complainants' brief, if I understand it correctly, denies the partnership *in the stock*, but admits that there was a partnership as to the *proceeds of the stock*, it being the purpose of the parties to sell the stock and invest the proceeds. This seems to be the narrow ground which divides us.

Part of plaintiff's evidence is a document, which we again copy:

> A receipt from White to Lipscomb of 4th December, 1838, is as follows, to-wit: Abner S. Lipscomb is jointly interested with me in *fifty-six shares of Galveston*, out of which he has received five shares, subject to any defalcation, should there be any, in M. B. Menard paying the full amount of the fifty thousand dollars paid by me to the Texas government.—David White (p. 122).

Language could not make clearer that the partnership was in the shares of stock. True, it would result in a partnership in any proceeds of the stock also, but it was distinctly in the

shares themselves. This was on the 4th of December, 1838, several months previous to the power of attorney from White to Lipscomb which bears date, April 8, 1839.

Exhibit A to plaintiff's deposition of Molton (121, 122), is as follows:

Judge A. S. Lipscomb's letter from Austin county, Texas, December 24, 1842, to Dr. Robert J. Ware, Ex'r., of David White, said: "In the Galveston City stock, Mr. White and myself were jointly interested to the amount of *seventy-five or eighty shares*. I am not positive as to the exact number, but it can be ascertained at the office of the company in the city of Galveston. The whole was placed at my disposition, to be exchanged for lands, if I thought it most advisable. Under this authority, I have disposed of *twenty-one shares* for city lots in Galveston, and one hundred and forty acres of land adjoining Velasco. The titles to the lots are in my name, but *I am only the owner* of *one*-half; the other half belongs to the estate of Mr. White. The titles to the one hundred and forty acres are not yet made out. The lots were selected mainly by Mr. White himself," (121, 122).

The plaintiff's witness, Molton, proves copy of a further statement by Judge Lipscomb, which is here inserted in full, with Molton's italics (122).

Statement of an account of Galveston stock, belonging to the estate of David White, and myself, etc.

"*Sixteen shares* sold for lots in the town of Galveston, for *half league of land on the waters of the Neches;* the title all in *my* name, but the estate of Mr. White jointly interested with me.

"*Five* shares sold for the tenth of John Wharton's headright league at Velasco; title not yet completed.

"*Five* shares sold for twenty shares of the league and labor at Edward's Point; certificates in my own name.

"Received *sixty two* shares in all. I was jointly interested in *fifty-six* of them. *Leaving on hand for the estate of D. White twenty-one shares* (21). I advanced to D. White five thousand dollars, part payment of the draft in favor of T. J. Green. One thousand dollars was paid in Mobile to me by D. White, and two thousand dollars has been paid Michael B. Menard; leaving two thousand unpaid. It was all to have been paid out of the money coming from Menard to White.

(Signed) ABNER S. LIPSCOMB."

8th January, 1844.

Each of these statements is alike conclusive that the partnership was *in the stock*. While it would result also in the proceeds or investments of the stock, the disposition of them, or exchange for lands was left to Lipscomb's discretion, but yet their joint interest was in the stock itself. Nothing can be clearer.

That Billingslea, when he came to Texas, in June, 1843, and Borden, when he made the report to him, both well understood that the interest of White and Lipscomb was a joint one in the stock, appeared in Borden's report, with reference, manifestly, to his conversation with Billingslea. Bordan says:

"With respect to ascertaining *D. White's true interest in the stock*, which may have been transferred, I am unable to inform you, the *business being entrusted to Judge Lipscomb*, it would be desirable to obtain a statement from him" (49).

Which is equivalent to saying that, "although the sixty-seven shares of the stock of which I have given you a statement

stood in the name of David White, he had only an interest therein. Lipscomb had an interest. What the true interest of each is I do not know. The business having been entrusted to Lipscomb, he could give the information."

This shows the knowledge of Borden, agent of the City Company, of the partnership interest, though he did not know its exact extent (199, 200).

The partnership is also proved by the depositions of Gaines (199, 200) and of Bates (165, 169). Bates says: "White told me that the interest of himself and Lipscomb in the investment in Galveston was a partnership betwen them" (167).

Molton in his application to the City Company, April 28, 1869, says:

> "In 1839 and 1840, and subsequently, David White and Abner S. Lipscomb had *certain joint interests in stock* in the Galveston City Company, of which it is my belief, that the estate of White never realized its proper, *equitable share or interest, as against the estate of Lipscomb;* and it is with a view to the ascertainment and assertion of those rights that I now seek information" (249).

I affirm, with entire confidence, that the Court will not find a scintilla of evidence in the entire case to show that the partnership did not commence until sale of the stock, and was only in its proceeds. This is a naked, unsupported assumption by the other side.

The proportion or extent of Lipscomb's interest is not material. The stock was treated, as a whole, an entirety, all of it passing into Lipscomb's possession, control and disposition. Whether his interest was the half of fifty-six shares, or the fourth, or some other interest of sixty-two shares, or sixty-seven, or eighty odd shares, does not vary the relation. There is no pretense of any distinction as to the stock—any ear-mark upon it; that the interest was specifically in the first fifty-six, the last fifty-six, or any other designated fifty-six shares, or which it was possible to mark or distinguish. The complainants make no pretensions to any such ease.

The case, then, as to partnership of Lipscomb in this stock could not be clearer. His right, as a partner, survived the death of White. He could dispose of the stock after White's death with equal authority that he could before his death. This is too elementary for discussion.

But it is urged that Lipscomb acted as the agent of White by virtue of his power of attorney, without our knowledge of or reference to the partnership, and that we are estopped from saying or defending that he was a partner of White. This has no foundation, in fact, in law, or in reason.

No doubt can exist that Lipscomb's partnership interest in the stock was well known and understood. The motives almost universal in human affairs would prompt him to let it be known. Of high character and position, his credit, as jointly interested with David White in Galveston stock and property, or as mere

agent of David White, was very different. That he should make transfers as attorney, by the record, and not as partner, when the partnership existed *in pais*, was in manifest accordance with business. But to undertake to infer from this that Lipscomb kept a secret of his partnership interest, or that he was not communicative of it, is irrational. Every transaction made by him showed practically the reverse, and was an assertion of the partnership interest on his part. Why should the directors of the company have ordered and permitted the thirty-two lots to be conveyed to Lipscomb and White, except upon the understanding of the partnership between them. Lipscomb says the title to the thirty-two lots was taken in his name. This was when reconveyed to him. How so taken, in either case, except that the parties recognized his rights as partner? He sold five shares for Velasco property taking the title in his own name. He sold five shares for twenty shares at Edward's Point taking certificates in his own name. He sold shares of Galveston stock for half a league of land on the Neches. Title in his own name. No record could present stronger evidence of the continuous acts by Lipscomb and the common understanding of all parties with whom he dealt, not only of his partnership interest, but his right to employ his own name to represent that interest. The Brief says the claim of partnership is "a stale demand!" If it is meant that to go back forty-seven or forty-eight years and prove the character and rights under which parties acted in order to illustrate and sustain their acts, and to sustain important rights which have grown up and existed all that period, constitutes staleness, we admit the full force of the term, though the application and consequences claimed from it are quite original.

It is argued too, that Lipscomb in 1844 admitted that twenty shares belonged to White's estate upon a settlement between himself and the executor, and therefor, the transfers of the stock which had been made years before by him are void, although he may have been a partner of White's. This is equivalent to alleging that every dealing with a partner in the disposition of partnership effects is at the hazard of a final settlement of accounts of the partnership, and to a reclamation in behalf of the partner ultimately found to have a balance against the partner who acted in the dealing. What has the final settlement of accounts between partners to do with the right and authority of the partner to deal with the partnership effects? I do not think I can be in error in my view of the entire want of force in such propositions. The legal right and authority of Lipscomb as a partner in the stock is plainly demonstrated, and that alone disposes of the case, without any other consideration, even if it were true that stock still standing in the name of White at the time of his death was transferred by Lipscomb after White's death.

POINT VI.

THE JOINT INTEREST OF LIPSCOMB IN THE STOCK CONTINUED HIS POWER IN FORCE SUBSEQUENT TO WHITE'S DEATH.

We have discussed Lipscomb's authority as a partner, independent of the power of attorney. Laying out of view the question of partnership, it is undeniable from this record that Lipscomb removed to Texas mainly influenced by his joint interest in this stock (the extent of that interest in no wise material.) Lipscomb's interest was in the stock, and in the proceeds of the stock, which he had equal power to dispose of. On that state of facts the law is well settled, and without exception, that his power to sell the stock did not cease on the death of White. It was a power, coupled with an interest in the stock itself, which survived the death of the grantor. I do not attempt to go over the facts of this branch of the case, which have already been explained. The law is plain.

"Where an authority or power is coupled with an interest, or where it is given for a valuable consideration, or where it is part of a security, then, unless there is an express stipulation that it shall be recoverable, it is, from its own nature and character, in contemplation of law, irrevocable, whether it is expressed to be so on the face of the instrument conferring the authority or not." Story's Agency, last ed., sec. 477, and many references to text books and cases.

"Where an agent has interest in the partnership property which his agency covers, then his authority is not revoked by death." Wharton's Agency, sec. 105.

POINT VII.

WARE, WHITE'S EXECUTOR, COULD HAVE EASILY OBTAINED TWENTY SHARES OF STOCK FROM LIPSCOMB IN 1844, BUT FOR HIS OWN DEFAULT AND CONTINUOUS LACHES AND NEGLECT, OR, BUT FOR CAUSES WITH WHICH THE COMPANY WAS IN NO WISE CONNECTED.

It is very clear from this record, taking all these unsigned receipts, orders, etc., as evidence of the acknowledgments and purposes of the parties at that time, that if Robert J. Ware, executor of David White, when he came to Texas to interview Lipscomb, in January, 1844, had not been prevented by high

water from going to Lipscomb's residence, (as they allege), he could then have settled with Lipscomb, and obtained twenty shares of stock in the company. Lipscomb would have delivered him four shares—not of still existing White, trustee, stock—that is merely idle—but he then had six shares of stock standing in his own name (68) and he would have given him an order on Love for sixteen shares, not of original David White, trustee, stock, imagined to be in Love's hands—which is also idle and positively disproved by the terms of this order on Love, itself: "Please deliver to Dr. Robert J. Ware, executor of David White, *sixteen shares of Galvesston stock.*" Not any certain sixteen shares of David White, trustee, stock on deposit with you, as would have been stated if such had been the fact; and also disproved by the receipt prepared for Ware's signature for four shares of Galveston City Stock, and an order on James Love, Esq., of Galveston, for sixteen shares, *which order*, "*if paid*," etc. At that time Love had standing in his name 44 shares of stock in the Galveston City Company (44), and if that order had been presented to him, there is not the shadow of a doubt that he would have transferred the stock as requested. That correspondence did not at once take place between Lipscomb and Ware, growing out of their failure to meet—that Lipscomb did not advise Ware of the settlement, he had the papers prepared to make, no one acquainted with men's affairs, will doubt. Bates testifies of Ware, "he was David White's son-in-law, was executor of White's estate; he was a man of ability and popularity—reputation—an energetic business man, very close in money matters—man of wealth; a large planter, and frequently in the Alabama legislature (167). Why was settlement not made between them in 1844? The reasons are to be plainly inferred from what this record contains and what it does not contain, but remains in the keeping of the complainants. At the same time Lipscomb prepared the order to Love and the receipt from Ware he prepared the settlement of account between himself and White's estate, showing, that whilst he admitted himself bound for twenty shares of stock to White's estate, the latter owed him $2,000—"I advanced to White $5,000, part payment of the draft in favor of T. J. Green; $1,000 was paid in Mobile to me by D. White, and $2,000 has been paid by M. B. Menard, leaving $2,000 unpaid" (122). And see the further statement of account, produced by same parties, which Lipscomb had ready for Ware, which he says was signed by David White showing cash balance in Lipscomb's favor, $2,537.80. The stock was worth at that date $125 to $150 per share, making, at most, say $3,000 value—against which, it is apparent that Lipscomb claimed $2,000 or $2,500, with a number of years' interest. How far Ware recognized the correctness of this, either as to the stock or the money, what Ware's adversary claims were, we have no means of know-

ing. To have so settled, and obtained, the twenty shares of stock, would have yielded him nothing and was therefore of absolute indifference.

We have it, however, now established conclusively that, in January, 1844, it was perfectly within the knowledge of Ware, executor of White's estate, that Lipscomb was ready to account to him for twenty shares of Galveston City Company stock, and that he could then have obtained them. And yet, thirty-seven years afterwards the wife of Ware, and the heirs of White, are suing the Galveston City Company for those twenty shares of stock, alleging ignorance of all right to them; alleging due diligence to obtain the stock, and due diligence to ascertain their rights, with flagitious charges, blacking the reputation of all who were connected with the business.

The evidence was that Ware, in 1852, complained to Bates about the refusal of Lipscomb to settle correctly the business of White's estate (167), Lipscomb, on the contrary, prior to 1852, stated to Bates that he "had sold property belonging to himself and White, and that he would owe the White heirs on a settlement; that he had the advantage, but *if they would settle fairly with him he would with them*" (170).

In 1854 James was employed by Ware to look into the stock, evidently with a view to claims against Lipscomb. The stock, however, was of but little value, and matters continued as they were until the death of Lipscomb, and until Love became wholly broken down and unable to make good his liabilities. The failure to obtain the stock arose solely from the laches of Ware, growing out of outside disputes with Lipscomb, with which the City Company had no connection. Even if it were true (of which there is no semblance) that the company had originally, through the wrong of Lipscomb, put itself in the position of satisfying the David White trustee stock by renewals of other stock and conveyance of their full value in property, so as to render itself liable for the White stock, yet there was such plain opportunity for redress from Lipscomb, and such laches, as destroyed all equity against the Company.

Point VIII.

THE ALLEGED CAUSE OF ACTION IS BARRED BY LACHES AND IS A STALE DEMAND.

ARGUMENT.

David White died Dec. 10, 1841. Whatever cause of action

arose, according to their own version, must have arisen Dec. 3, 1841, and March 4, 1842.

The legal title and right to the stock, by the laws of Alabama, was cast on the executor of his estate, who probated the will and entered on the executorship.

Administration also was opened on the estate of White in Texas 1844 (230 *et seq*).

Careful attention is asked to the argument of counsel as to their efforts to procure information, the ignorance into which they were led, and the future discovery which was obtained shortly before 1881. They admit that Billingslea was sent to Texas expressly to obtain information in 1843. He saw Lipscomb. He also applied at the office of the Galveston City Company and obtained a full report from it as to who surrendered the original certificates, and got renewals.and it apparently was a full and fair showing that Lipscomb had duly transferred, etc.

Now, what did it show as to the certificates sued for? Three are sued for, numbers 33, 36 and 39, upon the sole and exclusive ground that they were renewed to Abner S. Lipscomb himself. And, yet *that exact identical fact is apparent on the face of the report* (47, 48). Sixteen are sued for—those renewed to James Love, March 4, 1882. It shows the fact of the renewal to Love, but it does not give the date of the renewals of those or of any of the others. It makes not the slightest statement or suggestion whatever of legality or correctness as to anything contained in the report. It could not be in the least misleading. As to any incompleteness about it—dates, mode, parties—Billingslea or Ware had only to make further inquiry, or Ware accepted it without any further diligence or attention.

As to the four shares, Nos. 108, 10, 27 and 28, which are sued for, they were reported as "not surrendered"—no suggestion made that White's interest in them had ever been conveyed, and, therefore, the report did in the most effectual. manner put the executor on inquiry as to these four shares. Allegation against the company as to them is groundless.

In July, 1844, Ware visited Texas to see Lipscomb but failed to meet him. Lipscomb was prepared to meet him and, to settle, as is evident. He had his accounts ready—his order on Love drawn—and the receipt to be signed by Ware. All the inferences which the ingenuity of counsel now draws as to the transaction with Love were there ready for explanation, with order on Love for stock. There is not the slightest ground to suspect concealment of any of these matters on the part of Lipscomb. To assume that Ware, the executor, thenceforthward, failed to obtain the information which he would have obtained if he had gone to Lipscomb's honse—that he failed to ascertain the facts in regard to the stock—what amount he had claim for—and all particulars affecting the rights of his

estate, is without the slightest ground or foundation, repugnant to all probabilities of business of men's affairs and transactions, and repugnant to the particular character of Ware and Lipscomb.

The argument for complainants then jumps from 1844 to 1854, with no sense of responsibility for this long period, no effort or pretense to show diligence by the representative of White's estate. It is only such misapprehension of the law governing Courts of equity which could ever have ventured on the argument that there had been no want of diligence in eleven years of admitted supineness. But we deny the indifference and neglect which they attribute to Ware. There can be no doubt that he was fully and perfectly informed.

July, 27, 1844, administration on the estate of David White was opened in Texas by W. B. Lipscomb, administrator, the son of A. S. Lipscomb. Suit of the most decisive and hostile character was at once instituted against Menard, claiming that he was indebted to White's estate over $14,000, with a large amount of interest, that it was a lien on all the property of the Galveston City Company, and Jones, trustee in the deed of trust, and agent of the company, was made party, and an injunction prayed against all the operations of the company (237). That this suit was, with the knowledge and privity of Ware, executor, is not only to be certainly inferred, but is shown by his own letter (121). If, at that date, there had been responsibility of any kind on the Galveston City Company to the estate of White, no motive can be imagined why Lipscomb, as administrator, under the influence of his father and the direction of Ware, would not have asserted it. The facts were all fresh, the parties living. The means of ascertaining and establishing the truth easy and certain ; not only the sense of duty, but the interest of lawyers combined, to prosecute whatever claims could have been successfully done. There was evidently war to the knife against the City Company. The failure of the administrator at that period to ascertain any rights against the City Company, or, rather, the recognition, with all his opportunities and motives, to claim any such rights, we take to be of much weight.

Ware, executor, was again in Texas and saw Lipscomb prior to 1854, with opportunities of course to make inquiry of the City Company, the records and papers of which were open to unrestricted examination. Molton says in his deposition that Ware's visits to Texas were in '44 and '58. At the first, as we have seen, he failed to see Lipscomb. Ware's own letter to Lipscomb, written March 5, 1854, shows that he had prior to that date, and subsequent to 1844, when he did not see Lipscomb, visited Texas. In that letter Ware says: "It would be unnecessary at this time to state the various reasons why I have not visited Texas *since I saw you there*" (121). The point

is, that the executor, Ware, was in Texas, saw Lipscomb, with no reason to believe that Lipscomb had any concealments and with perfectly free and open access to all the books and papers of the Galveston City Company. Bates' evidence shows clearly that in or prior to 1852, there had been a meeting between Ware and Lipscomb in which the amount owing by Lipscomb had split them, each attributing to the other unwillingness to a fair settlement. We come now to 1854 when A. F. James, a real estate agent, more familiar with the records and papers of the Galveston City Company, than the agent himself, Cole, investigated the status of every share of David White's stock in the Galveston City Company with no limit or restriction whatever (49, 50, 51, 67). Judge Cole, the agent of the company made out for him a "historical record" of it. Their next great point is based upon that document in which the agent of the company reported that all but six specified shares had been "duly surrendered and renewed, transferred to various persons and finally cancelled." Their constant exclamation now is that the company reported in 1854, that the stock had been "*duly surrendered*"—which they now argue involved error of fact and law, and so misled them as to excuse all further diligence. It is to be observed first, that the report of the City Company was made, as then stated and explained, under no suspicion or claim against the company, but as a foundation of liability on the part of Lipscomb (67), so that there could have been no design of any concealment. But instead of concealing, that report again fully exhibited the facts which lie at the foundation of this suit. It not only showed the renewal of the three shares of stock to Lipscomb, but gave the date Dec. 3, 1841. It showed the date of the renewals of stock to Ashbel Smith in 1845, and it showed the renewals to James Love, March 4, 1842. That the agent should say, duly surrendered, was only to affirm that they had in the office of the company the proper indorsements of transfer authorizing surrender. Question as to sufficiency of indorsements, in blank, to transfer the stock—the recognized practice of the company from its foundation—never entered the thought of the agent, nor of A. F. James, nor of any party, agent or lawyer, until it was raised as a make weight in this case. No such suggestion, or idea, was broached in 1869, or whilst inquiry in regard to the stock was in the hands of Ballinger, Jack & Mott.

We come now to 1858, when Ware again came to Texas. Lipscomb was dead. Concert was brought about between Giddings, the attorney of Lipscomb's estate, and James, as Ware's agent, to see if any claim existed against the company. All these receipts and orders, whatever the papers of Lipscomb, White and Ware contained, were collated, and the inquiry fixed on the exact fact whether Lipscomb had transferred any

of the White stock subsequent to White's death. James writes to Ware, April 22, 1858, "The acts of Judge Lipscomb, during the lifetime of White, doubtless preclude the heirs. But at his death the authority of course ceased, and the question as to the liability of the company to account to the heirs for the stock transferred subsequent to the decease of White presents itself" (83.) It is at this date that the company passed the resolution prohibiting the indiscriminate examination of its books and papers. Both Cole and Goddard testify positively that this was not caused by any reference to the White stock; and it appears that the agent of the company proposed that James should make all such examinations as he pleased, provided it was agreed that White's heirs would abide James' decision. James wrote to see what Giddings thought of this; and then the curtain drops again for eleven years (84). Here, then, twenty-three years before this suit was brought, we have the executor of White, with whatever aid could be furnished by Lipscomb's estate, with his attention fully on the direct point —the liability of the company for any transfers of stock made by Lipscomb subsequent to White's death—the company under a general rule, declining to permit examination of its books, but ready to do so if the decision of Ware's own agent would be accepted as final. At that point, in a matter then delayed over sixteen years, all further diligence or efforts of any kind drop for eleven years more. And this is the diligence exacted by the Court of equity!

We come now to April, 1869, when Molton and Ware's executor came to Galveston. They came solely in behalf of Ware's estate and Mrs. Ware. They were adversary to all right of the other heirs of White to the city lots or the stock. They got $14,000 remitted to Ware's executorfor the lots (139). The question as to a claim of stock against the City Company was submitted to Ballinger, Jack & Mott, the discussion and correspondence being almost exclusively with Ballinger. The sole claim, or idea of claim, was as to the sixteen shares, renewed to Love March, 4, 1842, on the hypothesis that Lipscomb acted as agent of White, and transferred the stock after White's death. On that hypothesis the opinion was expressed, that on account of the lapse of time there could be no recovery; but in a certain suit then pending, for one of the White lots, it was thought such facts could be ascertained, as the books of the City Company would show; and further, a suit was then pending, in the Supreme Court, against the City Company, to establish a certificate of stock, issued by David White in Mobile, which it was supposed, would settle principles as to the continuous claims of stockholders long denied and withheld; and if facts could be ascertained confirming the suspicion as to the time that Lipscomb transferred the White stock, and the Su-

preme Court should establish principles changing B. J. & M.'s view as to limitation and laches; they would so advise them, and would be glad of employment to bring suit. It was a transition period of our government and courts. The lots were secured for Ware's estate without any trial, such as was anticipated, or the examination of the Company's agent as a witness, and the case was not decided by the Supreme Court until in 1875 (42 T. R.) Meantime a general retainer was offered to Ballinger, Jack & Mott, as their lawyers, by the City Company. Two of their then suits required the critical examination of all the White stock, claim to interest in which were set up in behalf of Lipscomb's estate. The employment was accepted, with a distinct statement of their relations to the White stock and to Ware's estate, and their right to bring suit thereon. See Goddard's clear explanation of this, and of B. J. & M.'s understanding of their relations to the White claim (174-5-6, 211 *et seq.*) B. J. & M. then, necessarily, examined White stock, share by share, and also obtained information from Love. Molton's own letters show plainly the original opinion of B. J. & M., that the lapse of time was a bar, the only doubt being as to Mrs. Ware.—See May 8, 1869, directly after leaving Galveston, and April 14, 1879. On May 30, 1873, he wrote:

"On the 6th of July, 1872, I received my last letter from your Mr. Ballinger, giving an opinion that *limitation was a bar* to the claims of the heirs of David White against the Galveston City Company for stock improperly transferred to others in the company's book. He stated, however, that the Supreme Court, then in session, would decide a similar case upon the subject of limitations, which would go a long ways toward settling the question in this claim. Has said Court ever yet rendered a decision in said similar case, and was it in favor of the bar or against it. If they settled that a bar was not completed, what would be your advice as to the best course to be pursued against the Galveston City Company in respect to our claim?" (219).

On the 17th of June, 1873, B. J. & M. wrote to him that "very careful and thorough examination had satisfied us, without doubt, that the heirs of White could not recover." (224).

Molton's oath of the facility with which Ballinger assured him in Galveston, in 1869, that he could get around limitations, and the zeal with which he was ready to argue the same question against the City Company with which he had argued for the company—and the continued correspondence after June, 1773, and his continued reliance on him to bring suit must pass for what it is worth.

From that date, June, 1873, the curtain again falls, with no further step taken for nearly eight years, when, in 1881, a bargain is made with J. R. Coryell, land agent, to employ counsel and bring suit for the half he can recover (128, 129).

The principles of the equity Courts as to the facts which will excuse delay in the prosecution of suits based on claims of long duration, beyond the ordinary periods of limitations, when time

has thrown its darkening shadows over the transaction and the Court is required to grope through the obscurities of the past, are well settled.

They have been best illustrated by the United States Supreme Court. In Sterns *vs.* Page, 7 How., 829, that Court say:

> As lapse of time necessarily obscures the title and destroys the evidence of past transactions, Courts of Chancery will exercise great caution in sustaining bills which seek to disturb them. They will hold the complainant to stringent rules of pleading and evidence, and require him to make out a clear case. * * A complainant seeking the aid of a Court of Chancery under such circumstances must state in his bill distinctly the particular act of fraud, misrepresentation or concealment—must specify how, when and in what manner it was perpetrated. The charges must be definite, and reasonably certain, capable of proof, and clearly proved. * * And especially must there be distinct averments as to the time when the fraud, mistake, representation or concealment was discovered, and what the discovery is, so that the Court may clearly see, whether by the exercise of ordinary diligence the discovery might not before have been made.

In Badger *vs.* Badger, 2 Wallace, 94, the United States Supreme Court say:

> There is a defence peculiar to Courts of equity founded on the lapse of time and the staleness of the claim where no statute of limitations governs the case. In such cases Courts of equity act upon their own inherent doctrine of discouraging for the peace of society antiquated demands, refuse to interfere where there has been gross laches in prosecuting the claim, or long acquiescence in the assertion of adverse rights. Long acquiescence and laches by parties out of possession are productive of much hardship and injustice to others, and cannot be excused but by showing some actual hindrance or impediment caused by the fraud or concealment of the parties in possession, which will appeal to the conscience of the Chancellor.
>
> The party who makes such appeal should set forth in his bill specifically what were the impediments to an earlier prosecution of his claim; how he came to be so long ignorant of his rights, and the means used by the respondent to fraudulently keep him in ignorance; and how and when he first came to a knowledge of the matters alleged in the bill, otherwise the Chancellor may justly refuse to consider his case, on his own showing, without enquiring whether there is a demurrer or formal plea of the statute of limitations contained in the answer.
>
> * * * "The Court below very properly dismissed the bill and refused to examine into accounts * * commencing forty and ending thirty years ago, *and to grope after the truth of facts involved in the mists and obscurity consequent on such a lapse of time.*"

In Wood *vs.* Carpenter, 101 U. S., 135, the Court again decides that

> "The circumstances of the discovery must be fully stated and proved and the delay which has occurred must be shown to be consistent with the requisite diligence [143.] "The means of knowledge are the same thing in effect as knowledge itself." "Concealment by means of silence is not enough. There must be some trick or contrivance intended to exclude suspicion and prevent inquiry." [143.]

And see New Albany *vs.* Burke, 11 Wal., 107; Broderick's will, 21 Wal., 503, 519; Upton *vs.* Trebilcock, 91 U. S., 45; Sullivan *vs.* R. Co., 94 U. S, 806, 811, 812; Godden *vs.* Kinnell, 99 U. S., 201; Hoyt *vs.* Sprague, 103 U. S., 136; Lonsdale *vs.* Smith, 106 U. S., 391; Moore *vs.* Green, 19 How., 69, 72; Baubien *vs.* Baubien, 23 How., 190; Carr *vs.* Hillon, 1 Carter,

C. C. Rep., 220; Angell on Lim., 187 and note; see Philippi *vs.* Philippi, 115 U. S., 157, for a strong reassertion of the general principles that:

"When a trust relation is repudiated, and time and long acquiescence have obscured the nature and character of the trust, or the acts of the parties or other circumstances give rise to presumptions unfavorable to its continuance, in all such cases a Court of equity will refuse relief on the ground of lapse of time and its inability to do complete justice."

In absence of a statute of limitations if twenty years are allowed to elapse from the time at which proceedings could have been instituted for the settlement of a trust without the commencement of such proceedings and there has been no recognition or admission within that period of the trust as continuing and undischarged a presumption of settlement would arise as a positive bar."

Held also that the period in Alabama excluded from the limitation laws will be considered with reference to laches and stale demand.

And see Livingston *vs.* Proprietors, &c., 16 Blatch., 560, 1 and 2, in which a party sued for 50 shares of stock in a mining company belonging to his father, and *never alienated*, but it had been for a long time openly claimed by the company, and the general principles of laches were held applicable.

See Leavenworth Co. *vs.* Chicago, &c., Co., 18 Fed. R., 209.

In U. S. *vs.* Beebe, 4 McCreary, 12, held that whilst limitation does not run, nor can laches be directly imputed against the United States, where there has been such delay as from the death of witnesses to render transactions obscure and doubtful, the usual presumptions of Equity Courts apply. Boyd *vs.* Wylie, 18 Fed. R., 360.

The legislation in Texas goes beyond any other State in establishing short periods of limitation, and its Courts are perhaps stronger than in any other State in applying like rules to create the presumption of the settlement of transactions and of the staleness of demands.

See Hemming *vs.* Zimmerschitte, 4 T., 159, 169; Cordova *vs.* Smith, 9 T., 129; Dewitt *vs.* Miller, *Ib.*, 246; Tinnen *vs.* Mebane, 10 T., 246; Wingate *vs.* Wingate, 11 T., 434; Smith *vs.* Hampton, 13 T., 459; Smith *vs.* Talbot, 18 T., 782; Watson *vs.* Inman, 23 T., 531; Smith *vs.* Fly, 24 T., 352; Glasscock *vs.* Nelson, 26 T., 538; Mosely *vs.* Withie, *Ib.*, 728; Carroll *vs.* Evans, 27 T., 262; Bailey *vs.* Trammell, *Ib.*, 328; Carlisle *vs.* Hart, *Ib.*, 350; Brown *vs.* Guthrie, *Ib.*, 610; Peeler *vs.* Guilkey, *Ib.*, 358; Yeary *vs.* Cummings, 28 T., 94; Hunter *vs.* Hubbard, *Ib.*, 546; Hudson *vs.* Wheeler, 34 Tex., 356; Bremond *vs.* McLean, 45 Tex., 18, 19; Kuhlman *vs.* Baker, 50 Tex., 630; Alston *vs.* Richardson, 51 Tex., 6; Conolly *vs.* Hammond, 51 Tex., 635, 647, 8.

Under the settled principles of law applicable to this branch of the case, the means of knowledge are equivalent to knowledge, and the necessity of showing clearly sufficient grounds why the want of such knowledge, or means thereof, was unattainable, is on the plaintiffs.

To the contrary of this, the facts show every evidence and presumption of actual knowledge on the part of Ware. Not a single ground exists to impute concealment to Lipscomb. He stood ready with his account as to the stock. That, his showing in January, 1844, was never thereafter made to Ware, or known to Ware, would be most unreasonable. The case contains no suggestion of any application to Lipscomb, or anything withheld by him. The burden of this proof is on the complainants. The evidence is positive that prior to 1858, the books of the Galveston City Company stood open to unrestricted examination. The report of the agent Borden, has already been discussed. It showed the renewal to Lipscomb of the certificates now claimed on the sole ground of that renewal. It showed the White stock then outstanding. It showed all the renewals, but gave dates of none; and stated nothing as to the mode thereof. If it was deficient in particulars, the duty of further inquiry was put upon Ware, or it was negligence then committed. In 1844, and after, the most hostile proceedings were being prosecuted by White's administrator, and by Lipscomb against Menard and the City Company. Lack of information, and of the means of information upon any point which would have involved the liability of the company to White's estate for stock, is a wholly groundless supposition. Lipscomb could have had no motive to conceal it, or to fail to put it in its strongest light. This state of things was permitted to continue for more than ten years—the longest period of limitation ever required by our laws. Then, the agent of Ware, better acquainted with the records of the company, and with everything relating to its affairs than the agent himself, recently appointed, examined the books, &c., of the company, and obtained a report upon the stock showing on its face all the facts forming the grounds of this suit—the renewal of the stock to Lipscomb, December 3, 1841; of the stock to Love, March 4, 1842; and to Ashbel Smith in 1845.

In 1858, Ware employed the attorney for Lipscomb's estate to act in conjunction with his own agent and attorney, and every receipt, order and paper, which they now present, was then in their hands. The direct and only point for their investigation was known and stated to be the transfer of stock by Lipscomb after White's death. Whilst the company suggested its willingness for its books to be examined on agreement that the decision of Ware's own agent should be accepted as final, it denied then, as it has denied ever since, the right of free access to its books for litigious purposes. The information of Ware and his attorney—every item of it—was precisely in 1858, what it was in 1881. The demand for examination in 1869, was understood, at the time, to be merely a formal one. It is impossible to put the case in 1881 upon any other ground, than it stood in 1858, or than it had stood from 1843, or in fact from the date of White's death. This is not left to argument and deduction,

plain as they are. We have the oath of Molton, himself, as to the further and additional facts, and circumstances which determined the suit in 1881.

It was that the attorneys then employed had discovered in the course of certain litigation with the City Company that the Company was in fact the principal of the indebtedness contracted by Menard to White, and had made a certain provision in its books in 1851 to enable Menard to pay off White, which had been kept secret from White's representative, and no payment had been made. I here insert this part of Molton's deposition (112, 113.):

> The discovery of the fraudulent and deceitful conduct of the company, in concealing the rights of the heirs of David White as to the debt incurred for the very purchase of the land, the capital of the company, coupled with its continued refusal to give us an insight into the full history of the White shares, as to the question and time of assignment thereof, crystallized suspicion as to the alleged transfers into belief that the company had not told the truth, when it had certified that all the shares had been duly transferred by White and his attorney in fact, Lipscomb, before the death of White. While before, the character of the agents of the company, and their reputed ability to know what duly transferred meant, negatived any right to draw inferences against the truth of their formally certified statement as to the White stock, now that we were advised of their fraudulent conduct towards us in other matters, the said heirs of White felt they had the right to presume everything most strongly against the company. I therefore assisted my lawyers to get up data on this basis for the bill in this cause, and alleged that transfers had been made by Lipscomb, "attorney in fact," with naked power to sell, after White's death, when the only data we had were the two statements of the company, that the certificates, though presented to the company after the decease of White, had been duly transferred *before his death*, and I alleged that Lipscomb had transferred certificates from name of White into his own individual name of Abner S. Lipscomb, when we did not know that such was the fact; and it might have been, for aught we knew, that David White had personally assigned said certificate to Lipscomb, and this fully authorized the transfers, as the company had certified it had properly done. I considered the now discovered fraud on White's estate, and its repeated refusals to allow me to see the transfers, sufficient presumption of false statement of the company to justify making the allegations in the bill, when, in fact, they were based upon suspicions and presumptions, and directly opposed to the statements of the company, which were the only direct facts known or accessible to us.

The statement that "the company had certified that all the shares had been duly transferred by White and his attorney in fact, Lipscomb, before the death of White," shows simply the readiness of the witness to substitute his own argumentative opinions for facts under oath, for the company certified no such thing (pp. 48, 49).

This "*mare's nest*" of a discovery was also made the foundation of a suit by White's heirs against the company, which preceded this, and has already found its way to a final decision on demurrer to the bill in the S. C. U. S., 111 U. S., 170, the Court denying the fairness and truth of all their assumptions of liability for the Menard debt by the company; also held that it was barred by limitation, and as to the form of the suit that it should have been brought by a personal representatve of White; and showing that ignorance by the complainants and concealment by the company of a fact on which their liability might

arise would not constitute fraud. The flimsiness of any such pretext of newly discovered liability of the City Company is rendered more apparent from this record, when we see in 1844 that suit was brought by White's administrator against Menard and the company's agent, the trustee to whom conveyance of its property had been made, claiming a lien on the entire property of the company for the Menard debt, and seeking to suspend, by injunction, all the operations of the company until its payment.

It was then, as is distinctly shown in this case, this discovery of alleged "fraud" in relation to the Menard debt which "*crystallized suspicion*" of the parties who brought this suit into the allegations of the bill. The S. C. U. S. say in Sterns *vs.* Page, 7 How., 829, already cited, in dismissing the bill: "The complainant specifies no misrepresentation, concealment or fraud practiced by defendant, which has, for the first time, come to light. * * *In fact, it is very plain that this bill was filed on suspicion of fraud, and for the purpose of a discovery of facts from the defendant on which to found specific charges of fraud.*"

Every fact and circumstance known to Molton was known to Ware, White's representative, himself mainly or very largely interested, many of the parties living, and means of proof existing. He brought no suit. Under the champertous arrangement existing in this case (128–129), the suspicions of the present parties have crystallized into this adventure, the stock having undergone the vast increase in value which has been shown

These complainants as a ground of merit to enable them to enter a Chancery Court to explore transactions which occurred in 1841 and overturn rights claimed from that time, allege, owing to their residence in Alabama and Florida, their ignorance until about 1869, even of the fact that David White owned stock in the Galveston City Company. On very similar allegations by heirs to the estate of Senator Broderick, of California, the S. C. U. S. say, 21 Wal., 519.

> Parties cannot by their seclusion from the means of information claim exemption from the laws that control human affairs, and set up a right to open up all the affairs of the past. The world must move on and those who claim an interest in persons or things must be charged with a knowledge of their status and condition, and of the vicissitudes to which they are subject.
>
> The general rule of the equity courts on this subject is thus laid down: "A delay which might have been of no consequence on an ordinary case may be amply sufficient to bar the title of relief when the property is of a *speculative character*, or is subject to contingencies, or where the *rights and liabilities of others have been in the meantime varied*. If the property is of a speculative or precarious nature it is the duty of a man to put forward his complaint at the earliest possible time." Kerr on Frauds, 304.

Even the State loses its rights not enforced against a corporation when by changes of stockholders new purchasers for value based on the acquiescence of the State, their stock would

be unfairly affected and injured. State *vs.* Bank of Newbern, 1 Dev. and B., Eq. R., 226.

Here, the property or rights in question were peculiarly of a most speculative character—stock in a new city enterprise. The holders of all the twenty-four shares of White stock now sued for exercised their choice and privilege, as White himself had personally done with a number of shares, and as was common to all stockholders, to surrender the shares and obtain its value in the scheduled city lots of the company. Those lots have been, of course held to this day. Their value has vastly augmented. The value of each remaining share of stock in the company has been based upon the surrender and satisfaction of those shares. The company with competent, honest, prudent officials, Borden & Cole, and subjecting its cancelled stock afterwards to rigid examination by lawyers of its board, Goddard & Hartley, has had its own faith, and extended its assurances to the public in the validity of those cancellations and the rights of the remaining stock. That stock has been the subject of every form of dealing and transaction. Its holders have continued to take out their values in property, until when the bill was drawn there were but forty-five shares and when Cole testified but forty-two shares of the stock remaining, the value of each near $9,000 (79).

The Galveston City Company is but an artificial being, a name, representing nothing of itself, but standing for the rights and interests of these forty-two holders of its stock. Shall their rights thus acquired, be destroyed or injured by the resurrection and re-establishment of this White stock, defunct for now near forty-five years? Every consideration of justice, of fairness, of reason and of public policy are repugnant to it.

They attack the acts of Lipscomb, who was the friend, the lawyer, the trusted agent, the partner of White—who had largely aided him to acquire White's original claim. Lipscomb lived for twenty-five years after White's death. He retrieved his fortune moderately, and died independent; his son's deposition says: Leaving about $30,000 to his children (209). This record contains not the slighest ground for any imputation that he was not ready to deliver to White's executor every share of stock to which it had claim, and to settle all other matters justly and honorably. Few have carried to their grave a larger public respect, or a larger circle of friends, whose adoption was tried, and grappled to him with hooks of steel. Robert J. Ware does not leave a good impression by this record. Bates says: He was rich, energetic, very close in money matters (167). Molton, his son-in-law, testifies that he "possessed his confidence in matters generally, but in his business matters, which was very large, Ware acted upon the principle that *secrecy was the soul of business*" (p. 134). Evidently, a distrustful, suspicious, hard man—qualities which, do doubt, stood in the way

of a fair settlement with Lipscomb, and were not favorable to disclosures to others, as to the interests which he represented, he had bought out the heirs in White's estate, and it is plain that, with his great wealth, the settlement he could have effected with Lipscomb, getting the stock and paying the amount Lipscomb claimed due to himself, would have yielded little or nothing at that day. He permitted matters to drift until Lipscomb, failing to get the money he claimed from White's estate, evidently felt himself justified in retaining the stock in his own hands, and until whatever claim existed against Love was wholly lost. The qualities of Ware, selected by White as his executor, may not have been fortunate for White's heirs, but the Galveston City Company can incur no blame or censure on that score.

For White's estate, however, to have realized this stock at any time in years after his death, it would have been of the most trifling value, and would, most certainly, have been absorbed in the administration. One of the curious features of this litigation is, that in 1869, White's estate was wholly insolvent, indebted to Robert J. Ware, more than forty thousand dollars, (127, 215, 218), but that some decree was rendered, showing its solvency. And then their rights of action were all "pooled" for this suit, as explained by Molton, as follows (113, 114):

> Complainants (including Mrs. Asenath A. Ware, residuary legatee under the will of Robert J. Ware, and entitled as such to whatever interest, if any, in the said stock her husband may have acquired by virtue of the transfers by some of the complainants) in order to simplify, save expenses, and rid themselves of the troublesome question of forced heirship in Texas, had before the filing of this bill mutually agreed to participate in and prosecute their respective interests or claims, in their capacity of heirs at law of David and Mary S. White; these complainants being all capable of contracting *inter sese*, and being all the persons that ever took any interest, whatever, in either estate of David or Mary S. White under the law, the wills or the transfers; and every interest in the subject matter of this controversy being represented in the present complainants.

Point IX.

THE SUIT IS BARRED BY THE STATUTES OF LIMITATION.

As a suit for personal property the bar is two years.

To enforce even a direct trust after its repudiation—or a constructive trust—the longest limitation in any cause of action ever required by our courts is ten years.

Legal title to personalty in Alabama vested in the executor. Limitation commenced running against the executor in Alabama, and the administrator in Texas, certainly as early as 1844. There would be no suspension of it subsequently.

According to Molton's evidence Mrs. Holtzclaw was 8 years of age at David White's death, in 1841, and therefore became 21 in 1854; Thos. P. Cowles was 10, and became of age in 1852; C. B. White 12, of age in 1850; Daniel White 15, and of age in 1847; Lumpkin 19, and of age in 1843. R. J. Ware died in 1867, since which time the plaintiff, Mrs. Ware, has been *feme sole*. All the parties are within the plain operation of the Statutes of Limitation. Mrs. White, under whom they claim in part, was *feme sole* from 1841 to 1853. Robt. J. Ware purchased out all the heirs—when we do not know.

If any exception from the statute were claimed, it should have been stated in the bill, otherwise there is no basis for any evidence of the fact. Story Eq. Pl., secs. 484-5. Angell on Lim., sec. 294.

There is no averment in pleading, nor any evidence in fact to take any of the complainants out of the operation of the statutes of limitations.

Shares of stock are the subject of conversion, like other property, and cause of action arises against the corporation and others connected with the conversion.

See Baker *vs.* Wasson, 53 T., 150.
Strong *vs.* H. & T. C. R. Co., 53 T., 162.
See Budd *vs.* Multonomah, St. R. Co., 12 Oregon, 271, for an intelligent case on the nature of certificates of stock.
Payne *vs.* Elhot, 54 Cal. 339, 35 Am. R., 80.
Anderson *vs.* Nichols, 28 N. Y., 100.
Kuhn *vs.* McAllister, 96 U. S., 87.

Disabilities do not cumulate. If it was infancy when cause of action accrued, it would not lap on to coverture. McMasters *vs.* Mills, 30 Tex., 591.

It is said by the appellants in their brief, that the Circuit Court dismissed the bill because of the laches of the plaintiffs. The record does not show this to be the fact; but it is quite clear that this was a sufficient ground, though not the only one by any means, upon which the Court may have ordered the dismissal.

Point IX.

Indorsement of the stock by Lipscomb and delivery of it for the purpose of transfer was a valid and effectual assignment.

We submit this point, not because it is entitled to consideration, not being made by the pleadings, but to show how utterly groundless is any claim raised by the appellants in this Court.

ARGUMENT.

The stock was personal property (Galv. City Co. *vs.* Scott, 42 Tex., 53).

Being personal property, it was the subject of valid sale, without writing at all, by mere delivery.

The power of attorney from White was a general power to alien, transfer, assign or convey the stock, not limited or restricted to any special mode or form, but in any manner he, White, could himself act.

The provision in the trust deed is: "The certificates shall be transferable by assignment, made in writing thereon, and signed and sealed by the holder, and acknowledged in the presence of two witnesses, before any Justice of the peace or notary public." See copy annexed to answer.

The uniform usage, custom and practice of the company from its commencement, as to all trustee stock, was to allow and recognize transfers of it as valid by the indorsement of the name of the holder thereof on the back of the certificate in blank (50, 157, 160, 183, 186). Of the certificates issued to David White, all were surrendered to the company, and in its possession, and in evidence. Thirty-one of them are endorsed in blank; 23 of them have the name of a transferee upon them; but it is quite apparent that they were filled up subsequent to the endorsement and first delivery, as in the case of the Smith certificates, which he filled up to himself, knowing the endorsement in blank to be the genuine signature of Lipscomb. Nine of these are transferred before a notary public. Not a single one is transferred before two witnesses and a Justice or notary public, as specified in the trust deed. On their surrender to the company by the original grantee, or the holder, under an endorsement, the company, in a number of instances, made its own entry of the surrender, without requiring endorsement. Other parts of the company's records doubtless showed the transaction, such as the renewal of the certificate or conveyance to them of lots.

Where the charter of a company prescribes a form of transfer of the certificates of stock, whilst in a few cases a rigid construction has been made giving effect to attachments, liens and rights of third persons, acquired in conformity to the charter, as against transfers not complying with such requirements, the great weight of authority, such as to constitute the general rule, is thus laid down by Morawetz on Corp., § 185.

"By general mercantile usage, shares in a corporation are assignable by endorsement and delivery of the certificate issued to the owner as evidence of his right."

"The endorsement of the certificate invests the assignee with the legal title to the interest so assigned as against all persons except the corporation. Certificates for shares are dealt

with in the market like negotiable paper or chattels. The certificates are considered as representing the shares themselves, and when properly endorsed are passed from hand to hand like tangible property," (*Ib.* 189).

I need not refer to the text books nor to a great number of authorities cited in all the text books to the same effect.

This is well settled in Texas. Provisions in the charter, or by laws, or face of the certificate, requiring transfer in a particular manner, are regarded as for the benefit of the company, which it may enforce or not at its election. (Splann *vs.* Chew, 60 T., 536, 7.)

Seeligson *vs.* Brown, 61 T., 114, is a late case directly to the same effect; and an excellent collection of the cases can be found in the opinion of the Court, and also in the brief of the counsel for appellants in the present case, who in that case successfully maintained the vality of the endorsement in blank of the stock.

Telegraph Co. *vs.* Davenport, 97 U. S., 371, referred to by plaintiffs as a leading case, was one of transfer under a forged power of attorney.

In Menard *vs.* Shaw, 5 T., 338, the act of congress provided that certificates for the public debt of Texas should be transferred in a certain manner, and *not otherwise.* Upon a mandamus to compel the transfer otherwise, the Court said that the law was imperative.

We have examined the citations in the complainant's brief, and do not think they at all touch the case.

The foundation of every title in the city of Galveston was in a certificate of the City Company. Stronger proof of custom and usage, authorized and acted upon by a company, practiced by its stockholders, and by all parties dealing with it, to pass stock by endorsement in blank, could not be made. A decision which would at this day bring in question the validity of those transfers would be incalculable in mischief and injustice.

The presumption of law is that a person, who has possession of a certificate of stock, endorsed in blank, came by it honestly and in the ordinary course of business; and no proof is requisite of the consideration or of the circumstances of the sale. Possession is *prima facie* evidence of title. Holbrook *vs.* N. S. Zinc Co., 57 N. Y., 624.

The argument of the plaintiff throughout is an assertion that David White only intended to allow transfers of his stock in the manner provided in the trust deed, and that he was en-

titled to rely on this mode of transfer for his own security. The answer to which is:

First.—That, if there could be no transfer except by the letter of the trust deed, there could have been none by an attorney at all, as only the holder of the stock was permitted to transfer it. But, in the next place, he limited his power in no such manner, but gave it in the most general terms for the transfer of the stock—gave it in any manner that he could himself do it. Whatever then by law was a legal or equitable transfer, which he could make himself, he empowered his attorney to make. That the direction of a particular form of transfer in a charter or deed is for the protection of the holder of the stock, or a party against his own attorney is a perversion of law and reason on the subject. To attribute to White the intention that the stock should only be transferred by the formalities in the trust desd, is not merely fanciful, but repugnant to the facts. His own signature is found on but two shares, 108 and 109, Book A. The first he transferred to Rugely, November 12, 1838, *not under seal,* and not before two witnesses, the other he endorsed in blank, and it was also endorsed in blank by Lipscomb, and that particular share of stock containing his blank endorsement was surrendered in that shape to the company, as part consideration of the 32 lots (p. 70), which were selected by White himself. Each of the 16 shares surrendered to the company for these lots was endorsed in blank. That was as early as August 23, 1839 (see Complainant's Exhibit B 49). This custom so common to the company and its stockholders adopted in the dealings of White himself, over two years before his death, cannot be assumed to be unknown and unintended by White, except by mere perversion of all reasoning and probabilities. On the contrary, the legal presumption is that his knowledge extended to what was common and customary in the community and with respect to this stock. Everything we know of him, personally, strengthens that presumption. So far as the authority given by White is to be interpreted by the surrounding circumstances, necessarily involved in its exercise, it was a direction to the company to transfer the stock issued to him to any bearer of an endorsement in blank by his attorney, Lipscomb.

Begging the Court to excuse the length of this brief, which was necessarily protracted by reason of the great volume of the record, we respectfully submit the cause.

A. H. WILLIE,
Of Counsel for Gal. City Co. Appellee.